IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-856

AERO TRUCKING, INC., *Petitioner,*

v.

C & H TRANSPORTATION CO., INC.,
DAILY EXPRESS, INC., AND
DALLAS & MAVIS FORWARDING CO., INC.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

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Aero Trucking, Inc. (Aero), intervening respondent below, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit rendered October 10, 1978 in Case No. 77-1389, and the Order of said Court dated October 31, 1978 denying Aero's Petition For Rehearing. That judgment vacates, in part, Orders of the Interstate Commerce Commission (ICC) granting Aero's MC 60014 Sub 38 Gateway Elimination Application, which application was directly re-

lated to an application under Section 5(2) of the Interstate Commerce Act, 49 U.S.C. § 5(2), for approval of the purchase by Aero of a portion of the operating rights of Miller's Motor Freight, Inc.

OPINIONS BELOW

The opinion of the Court of Appeals entered October 10, 1978 (attached as Appendix A hereof) is reported at —— U.S. App. D.C. ——, —— F.2d ——. The unreported Order denying Aero's Petition For Rehearing is attached hereto as Appendix B.

Attached to this Petition as Appendices C-1 through C-3 are copies of the Orders of the ICC in Docket MC-F-12331, *Aero Trucking, Inc.—Purchase (Portion)—Miller's Motor Freight, Inc.* and Docket MC 60014 Sub 38, *Aero Trucking, Inc., Elimination of Gateway —York, Pennsylvania,* which are the Orders of the ICC involved in the Court of Appeals Case No. 77-1389.

Attached to this Petition as Appendix D is a copy of the Initial Decision of the ICC Administrative Law Judge in these proceedings, whose Statement of Facts, Findings and Conclusions as regards the issues presented in this Petition were affirmed and adopted by the ICC and, as such, became the subject of the Orders of the Commission involved in the Court of Appeals Case No. 77-1389.

JURISDICTION

The decision of the Court of Appeals was made and judgment was entered on October 10, 1978. Aero's Petition For Rehearing was denied by Order of said Court dated October 31, 1978. On November 6, 1978, Aero filed a Motion For Stay of Mandate pending the filing of the instant Petition.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and § 2350.

QUESTIONS PRESENTED

1. Whether the Appendix A opinion of the Court of Appeals vacating in part the ICC's Order granting Petitioner's MC 60014 Sub 38 Gateway Elimination Application exceeds the scope of judicial review set forth in Section 10(e) of the Administrative Procedure Act (5 U.S.C. § 706), by failing to consider the record as a whole in reaching its conclusion that the ICC Orders are not supported by substantial evidence.

2. Whether the Appendix A opinion of the Court of Appeals considered and properly applied the regulatory policy of the ICC regarding the evidentiary requirements for gateway elimination applications which are directly related to acquisition proceedings under Section 5(2) of the Interstate Commerce Act [49 U.S.C. § 5(2)].

3. Whether the Appendix A opinion of the Court of Appeals is in conflict with the decisions of this Court in *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System,* 419 U.S. 281 (1974) and *Alton Railroad Co.* v. *United States and Interstate Commerce Commission,* 315 U.S. 15, 22 (1942) regarding the evidentiary requirements to establish that the public convenience and necessity requires a proposed service.

4. Whether the Appendix A opinion of the Court of Appeals exceeds the scope of judicial review by substituting the Court's judgment for that of the ICC in deciding the extent to which Aero's Gateway Elimination Application is required by the public convenience and necessity.

STATUTES AND REGULATIONS INVOLVED

The pertinent portions of the following statutes and regulations are involved and are reproduced in Appendix E: Section 10(e) of the Administrative Procedure Act (5 U.S.C. § 706); National Transportation Policy preceeding Section 1 of the Interstate Commerce Act (49 U.S.C. § 1); Section 5(2) and Section 207(a) of the Interstate Commerce Act (49 U.S.C. § 5(2) and 307(a); Gateway Elimination Rules, 49 C.F.R. 1065; and Gateway Eliminations Policy Statement of December 3, 1974 (Federal Register, Vol. 39, No. 237, Page 42958, December 9, 1974).

STATEMENT OF THE CASE

On October 7, 1974 Petitioner Aero filed an application under Section 5(2) of the Interstate Commerce Act, 49 U.S.C. § 5(2), to purchase a portion of the operating rights of Miller's Motor Freight, Inc. (Miller's), which application was docketed as No. MC-F-12331. In compliance with the Gateway Elimination Rules promulgated by the ICC, 49 C.F.R. § 1065, and its Policy Statement issued thereunder on December 3, 1974, published in the Federal Register December 9, 1974 at page 42958, Aero filed a directly related gateway elimination application on January 29, 1975 which was docketed by the ICC as No. MC 60014 Sub 38. This Gateway Elimination Application was required in order that Aero be able to combine Miller's authority with the authority Aero already held so as to provide direct-route service from points in Aero's service area (comprising 18 states and the District of Columbia) to points in the 39 states included in the Miller authority Aero sought to purchase.

Nine shippers supported Aero's applications[1] and 13 carriers were in opposition.[2] Hearings were held before an Administrative Law Judge (ALJ) in July and August, 1975 and an Initial Decision served on December 11, 1975, granted both applications. On September 24, 1976 a three-Commissioner Division 3 accepted the ALJ's decision with modifications not at issue in this Appeal.[3] Petitions for reconsideration were denied on February 24, 1977 and certain of the opposing carriers[4] sought review in the United States Court of Appeals for the District of Columbia Circuit in Case No. 77-1389.[5] Appendix A is a copy of the lower Court's Opinion which vacates, in part, the Orders of the ICC and remands the matter to that agency for further proceedings.

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[1] Bethlehem Steel Corp.; Universal Cyclops Specialty Steel Division; Jones & Laughlin Steel Corp.; Grove Manufacturing Co.; Elwin G. Smith Division of Cyclops Corp.; Wheeling-Pittsburgh Steel Corp.; Gibson Motor & Machine Service, Inc.; Colt Industries, Crucible, Inc.; and United States Steel Corp.

[2] Ace Doran Hauling & Rigging Co.; C & H Transportation Co., Inc.; Daily Express, Inc.; Dallas & Mavis Forwarding Co.; Hennis Freight Lines, Inc.; Home Transportation Co., Inc.; International Transport, Inc.; H. J. Jeffries Truck Line, Inc.; Mercury Motor Express, Inc.; Moss Trucking Co., Inc.; J. H. Rose Truck Line, Inc.; Vance Trucking Co.; and Wales Transportation, Inc.

[3] The notice published in the Federal Register on April 4, 1975, 40 Fed. Reg. 15142, incorrectly included New York as a destination state and excluded Massachusetts and Vermont as origin states. The modification was necessary to correct these errors.

[4] C & H Transportation Co., Inc.; Daily Express, Inc.; and Dallas & Mavis Forwarding Co.

[5] Jurisdiction for said review is established by 28 U.S.C. §§ 2341 and 2342. Venue is invoked pursuant to the provisions of 28 U.S.C. § 2343. Petitioners did not challenge the Commission's orders authorizing the section 5 purchase of Miller's rights. They attack only those orders pertaining to the gateway elimination.

REASONS FOR GRANTING THE WRIT

1. In partially vacating the Orders of the ICC granting Aero's Sub 38 Gateway Elimination Application, the Court below has failed to consider "the whole record" as required by Section 10(e) of the Administrative Procedure Act, 5 U.S.C. § 706. While the Opinion of the Court below analyzes in some detail the record evidence submitted by Aero and its supporting shippers, said Opinion does not consider or analyze at all the evidence (or lack thereof) presented by those parties opposing the applications. This is particularly prejudicial when the Court criticizes the ALJ for allegedly failing to analyze Aero's competitive position. See Appendix A, page 16a.

Contrary to the criticism of the Court below, the ALJ did consider the competitive impact upon protestants' operations resulting from a granting of these applications. At pages 52a through 66a of his Initial Decision (See Appendix D hereto), the ALJ summarized the evidence presented by the opposing carriers, including (where applicable) summaries of the pertinent traffic exhibits submitted by such opposing carriers. In discussing the competitive impact resulting from approval of these applications, the ALJ found at pages 70a-71a of his Initial Decision:

> "The matter of traffic diversion presents no real issue. While most of the protestants contend that a substantial volume of their traffic would be susceptible to diversion, their evidence in this regard was not specific enough to provide a basis for drawing meaningful conclusions. Some showed traffic losses during the relevant periods but failed to relate such losses to the operations or proposed operations of the vendee. Thus, any loss shown by protestants may be attributed to the state of the economy rather than to the vendee's operations. Mere apprehension of loss of traffic does not constitute a basis for disapproving the transaction. In the past, transactions similar to the instant proposal have been approved, if shown to be otherwise in the public interest, notwithstanding, the loss of some traffic and revenue by competing carriers. Most of the protestants are financially strong, some presently enjoying the highest revenues in their history. The record clearly demonstrates that protestants' overall stability and financial status will enable them to offset the additional competition that may result from the proposed transaction. Nor will the competitive impact upon the protestants be significantly aggravated by reason of tacking the vendee's authority with the authority sought to be acquired, since the single-line traffic resulting from tacking the two segments of authority will merely be a substitute for the joint-line operations previously conducted by the vendee and other carriers. The Administrative Law Judge therefore concludes that the volume of traffic to be lost by protestants as a result of the proposed transaction will be insubstantial and will not seriously affect their operations, service or revenues."

These conclusions of the ALJ are not only supported by his summary of the evidence submitted by the opposing carriers, but also by Hearing Exhibit No. 23, a copy of which is attached hereto as Appendix F. That exhibit compares the revenues and tonnage transported by all opposing carriers with that of Aero for each of the years 1970 through 1974 and, in addition, sets forth the percentage of growth in both revenue and tonnage during that period.

In *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System,* 419 U.S. 281 (1974), this Court held

that the ICC could weigh competing interests to arrive at a balance that is deemed "the public convenience and necessity." This Court concluded:

> "A policy in favor of competition embodied in the laws has application in a variety of economic affairs. Even where Congress has chosen government regulation as the primary device for protecting the public interest, a policy of facilitating competitive market structure and performance is entitled to consideration. *McLean Trucking Co.* v. *U.S.*, 321 U.S. 67; *FMC* v. *Svenska Amerika Linien*, 390 U.S. 238; *Gulf States' Utilities Co.* v. *FPC*, 411 U.S. 747; *Denver & R.G.W.R. Co.* v. *U.S.*, 387 U.S. 485. The Commission, of course, is entitled to conclude that preservation of a competitive structure in a given case is overridden by other interests, *U.S.* v. *Drum*, 368 U.S. 370, 374-375, but where, as here, the Commission concludes that competition 'aids in the attainment of the objectives of the National Transportation Policy,' *McLean Trucking Co.* v. *U.S., supra*, 321 U.S. at 85-86, we have no basis for disturbing the Commission's accommodation." (419 U.S. at 298-299)

The Initial Decision of the ALJ, which was affirmed and adopted by the ICC, represents a weighing of the competing interests involved, and is wholly consistent with similar decisions involving gateway eliminations which are related to acquisitions under Section 5(2) of the Interstate Commerce Act, 49 U.S.C. § 5(2). For example, in *J. V. McNicholas Transfer Company—Control—Tom's Express, Inc.*, 122 M.C.C. 786 (1977), which decision is cited at page 20a of the Opinion of the Court below, the ICC announced and followed a regulatory policy which relaxes the standard of proof needed to show public convenience and necessity as applied to gateway elimination applications which are

directly related to purchase transactions. This policy, in effect, is that such related applications should be denied only when the record clearly demonstrates that there will be a significant adverse impact upon the competitive structure along the route. 122 M.C.C. at 794-795. This policy was reaffirmed by the ICC in a subsequent decision in the *McNicholas—Tom's* case, 127 M.C.C. 309, 313 (1978). The Orders of the ICC attached hereto as Appendices C-1 through C-3 are clearly consistent with this policy and must be sustained if the record as a whole supports the findings of the ALJ (as affirmed and adopted by the ICC) that approval of the application will not result in significant adverse impact upon the competitive structure. The Court below did not consider this regulatory policy of the Commission, nor did it analyze the record as a whole to determine whether or not there was substantial evidence to support the Commission's Orders. Rather, the Court below analyzed only that portion of the record dealing with evidence submitted by Aero and its supporting shippers. The Court below did not consider any of the evidence of record as relates to the issue of competitive impact.

2. In reaching its conclusions, the Court below has placed undue emphasis upon the decision of *Childress—Elimination Sanford Gateway*, 61 M.C.C. 421, 428 (1952), holding in effect that said decision sets forth wooden evidentiary requirements which must be satisfied in all types of gateway elimination proceedings. The Court has apparently failed to recognize that there are two types of gateway elimination proceedings; i.e., those which result from acquisitions under Section 5 of the Act, and those which result from new service applications under Section 207 of the Act. Aero respectfully

submits that subsequent decisions of the Commission have established that strict adherence to the *Childress* criteria are inapplicable to gateway eliminations, as here, which result from acquisitions under Section 5 of the Act.

As noted by the Court below at pages 4a-5a of its Appendix A Opinion, the *Childress* criteria require proof that:

> "(1) . . . applicant is actually transporting a substantial volume of traffic from and to the points involved by operating in good faith through the gateway and, in so operating, is effectively and efficiently competing with the existing carriers, and (2) . . . the elimination of the gateway requirement would [not] enable applicant to institute a new service or a service so different from that presently provided as to materially improve applicant's competitive position to the detriment of existing carriers."

See 61 M.C.C. at page 428. The balance of the Court's Opinion represents its effort to analyze the evidence submitted by Aero and its supporting shippers as applied to these wooden criteria. In so doing, the Court below has failed to consider the ICC's December 3, 1974 Policy Statement regarding the applicability of its gateway elimination rules to acquisition proceedings under Section 5(2) of the Act. As pertinent, this Policy Statement provides:

> "... Generally, the criteria in *Childress—Elimination Sanford Gateway,* 61 M.C.C. 421 and *Maryland Transp. Co., Ext.—Specified Commodities,* 83 M.C.C. 451, will be applicable to such gateway eliminations, giving consideration, of course, to the fact that irregular route rights under separate ownerships are involved."

The rationale of the Court below fails to give consideration to the fact that gateway eliminations resulting from acquisitions under Section 5 of the Act involve rights under separate ownership. This is clear because the Court holds Aero to a strict evidentiary burden of showing operations "through the gateway," totally ignoring Aero's traffic exhibits which show substantial service from and to the actual territories involved. At pages 14a-15a of its Opinion the Court below concludes that Aero's principal traffic study listing 2,224 shipments moving from the 19 state origin area to the 39 state destination area and handled in joint-line services by Aero and other carriers during the period 1969-1975 should be ignored. In fact, the Court concludes at page 15a of its opinion that:

> "To the extent that the Commission's Orders rest on this study, they cannot be upheld."

Such a finding, in effect, totally ignores the record evidence establishing Aero's competitive position with that of the opposing carriers. By woodenly applying the *Childress* criteria to this type of gateway elimination involving operating authorities under separate ownership, the Court below has ignored the Commission's gateway elimination policy as expressed in the December 3, 1974 Policy Statement.

3. The Court below has also failed to properly consider the evidentiary requirements in this type of gateway elimination proceeding as initially enunciated by the Commission in its decision reported at 119 M.C.C. 530 (1974). As pertinent, the Commission stated at page 550 of the report:

> "In deciding such an application we will apply the criteria enunciated in the *Childress* case *supra,*

as amplified in other Commission precedent decisions. This will not, as many parties fear, impose a greater burden of proof than that governing regular elimination-of-gateway applications, but will be somewhat more akin to the standard 'grandfather' procedure utilized by this Commission in the past."

This Court has had occasion to consider the evidentiary requirements in such "grandfather" procedures. This Court long ago established that under the "grandfather" concepts, applicants would be entitled to a liberal construction of the regulations with the goal of achieving "substantial parity between future operations and prior bona fide operations," without atomization or fractionalization of commodities or territory. *United States and Interstate Commerce Commission* v. *Carolina Freight Carriers Corp.*, 315 U.S. 475, 481 (1942); *Alton Railroad Co.* v. *United States and Interstate Commerce Commission,* 315 U.S. 15, 22 (1942). As pertinent to the territorial questions presented in this Appeal, this Court made the following observations in the *Alton Railroad* case, *supra,* at pages 20-21:

" 'Territory' is not a word of art. The characteristics of the transportation service involved as well as the geogrophical area serviced are relevant to the territorial scope of the operations which may be authorized under the 'grandfather clause.' While the test of 'bona fide operation' within a specified 'territory' includes 'actual rather than potential or simulated service' (*McDonald* v. *Thompson,* 305 U.S. 263, 266), it does not necessarily restrict future operations to the precise points or areas already served. The characteristics of the transportation service rendered may of necessity have made trips to any specified locality irregular or sporadic. And they may likewise have

restricted prior operations to but a few points in a wide area which the carrier held itself out as being willing and able to serve. The Commission has taken the characteristics of various transportation services into consideration in determining the scope of the territory covered by certificates under the 'grandfather clause.' Thus operations on irregular routes within a wide territory have been authorized in case of common carriers of household goods. *Bruce Transfer & Storage Co.,* 2 M.C.C. 150; *William J. Wruck,* 12 M.C.C. 150. Similar broad authority has been granted common carriers of oil-field equipment and supplies. *Charles B. Greer, Jr.,* 3 M.C.C. 483; *Union City Transfer,* 7 M.C.C. 717; *L. C. Jones Trucking Co.,* 9 M.C.C. 740. And a like result has been reached in case of automobile transporters such as the applicant in the instant case. *George Cassens & Sons,* 1 M.C.C. 771. And see *Charles E. Danbury,* 17 M.C.C. 243. The general theory underlying the household goods cases was expressed in *W. J. Wruck, supra,* pp. 151-152, as follows:

'Calls for service between the same points are seldom repeated. Traffic is not regular in any given direction. What may be infrequent but fairly regular business to or from a certain State for a small carrier may be only sporadic business for a large carrier; consequently, a frequency of service that might amount to 'grandfather' clause rights in the case of the former would conceivably be inadequate in the case of the latter. It would be an impractical solution to carve out oddly shaped areas for service based solely on the frequency of service; consideration must also be given to the general territory served under the holding-out, even if the business in some States may not equal that in other States in the territory.' "

Similar observations are equally applicable to the type of specialized iregular route heavy hauling operations embraced in the authority which Aero presently holds, and which it seeks to join with that purchased from Miller's. *C & H Transportation — Purchase — Gulf Southwestern,* 90 M.C.C. 636 (1962). The Court below has not only misapplied the Childress criteria, but has totally ignored the holding of this Court in the *Alton Railway* case, *supra.* At page 20a of its Opinion, the Court below states:

> ". . . Although atomization may be contrary to well-established precedent in motor carrier acquisition cases, that is not to say the same applies in gateway elimination actions."

Such a finding is wholly inconsistent with this Court's decision in *Alton Railway.*

4. The Court below has exceeded its scope of judicial review by substituting its interpretation of the record evidence for that of the ICC, rather than making a determination of whether the record as a whole contains substantial evidence to support the Orders of the ICC. As this Court has stated on many occasions, the test on judicial review of ICC action is whether such action is supported by substantial evidence on the record viewed as a whole. *Illinois Cent. R. Co.* v. *Norfolk & W. Ry.,* 385 U.S. 57 (1966). In reviewing actions of the ICC, the Court must consider the record as a whole in appraising the substantiality of the evidence, and if the judgment of the ICC is based on substantial evidence of record, and if within the statutory constitutional limitations, it is controlling even though the reviewing court might on the same record have arrived at a different conclusion. *Canadian Pac. Ry. Co.* v. *U.S.,*

158 F. Supp. 248 (DC-Minnesota, 1958). A reviewing court cannot substitute its own view for that of the ICC concerning what should be done, whether with reference to competitive considerations or others. *Acme Fast Freight, Inc.* v. *U.S.,* 146 F. Supp. 369 (DC-Delaware, 1956).

A review of the Appendix A Opinion of the Court below, however, compels the conclusion that the Court has analyzed the evidence of record, reached a conclusion contrary to that of the ICC, and found that such record evidence warrants only a partial grant of Aero's gateway elimination application. Although the Court concludes at page 21a of its Opinion that it does not undertake to substitute its judgment for that of the ICC, in the very same paragraph the Court does just that by stating that "the record justifies a grant of direct authority from points in Pennsylvania and Ohio to points in North Carolina, South Carolina, Florida, and Georgia . . ."

Not only does the Court below substitute its judgment for that of the ICC on factual matters, it does this (as noted above) without considering the record as a whole and, further, purports to interpret and apply the ICC's policy regarding gateway eliminations without recognizing the distinction which the ICC has made regarding gateway eliminations which are related to acquisition proceedings under Section 5. Although the Court below cites the first *McNicholas—Tom's* case, *supra,* at page 20a of its Opinion, it apparently failed to recognize that in case the ICC announced the relaxed evidentiary burdens applicable to such gateway eliminations, as follows:

> "These criteria, designed for use in a section 207 application, do not have complete transfer-

ability to the related gateway application. As we indicated in the Policy Statement, the fact that the irregular route rights involved are under separate ownership must be considered. Since no gateway existed prior to our authorization of tacking in the section 5 proceeding, interline operations, rather than tacking operations through the points now sought to be eliminated as related gateways must be considered in determining the susbtantiality of past operations. This fact necessitates a more liberal approach in determining whether direct service should be authorized. *Anderson Trucking Service, Inc.—Pur.—Bay,* 122 M.C.C. 673 (1977).

This approach is consistent with our treatment of other types of directly related section 207 applications. For example, the Commission has relaxed its standards of proof in related applications to convert contract to common carrier authority and vice versa. See *Ruan Transport Corp. —Purchase—James A. Hannah, Inc.,* 70 M.C.C. 694 (1975); and *Donaldson Transfer Co.—Control and Merger,* 85 M.C.C. 649 (1960).

Similarly, we believe that there are equities which justify imposing a lesser standard of proof in directly related gateway elimination applications. As the United States Court of Appeals for the District of Columbia noted in *Common Carrier Conference—Irregular Route* v. *United States, et. al.,* 534 F. 2d 981 (1976), the great majority of applications for unifications under section 5 of the act are filed for the purpose of joining the rights acquired with those currently held. In many cases the transaction is rendered valueless if the acquiring carrier is unable to integrate the new certificate into its operational system and the transaction will not be consummated by the parties. This, in practical terms, amounts to a waste

of administrative effort when the Commission has so recently found that the unification of the rights currently held with the rights acquired is within the public interest. In a related application context we should be careful not to work at cross purposes in the name of preserving the transportation system by finding under section 5 that the transaction is consistent with the public interest and then declaring that the public convenience and necessity under section 207 will not permit the transaction.

In addition, it is necessary to consider the purpose of the related gateway elimination application. Following the section 5 determination that it is within the public interest to join acquired authority with authority held for through service, the first consideration is that fuel-consuming, circuitous routes should not be the result. The elimination of the circuitous service is required. Whether or not is may be replaced by direct service depends upon the competitive effect upon the existing transportation market.

In a case involving an application for alternate-route authority, *West Bros., Inc., Extension—U.S. Highway 11,* 98 M.C.C. 572 at 574 (1965) hereafter *West Bros., Inc.* division 1, held that where effective competition with existing carriers was at issue, the withdrawal of protests and opposition is "an indication that existing motor carriers do not expect to suffer any material detriment from a grant of the authority sought." The division then concluded that the grant of authority would neither result in a new service nor a change in the competitive situation. Accordingly, where there is no opposition to a related gateway elimination we will follow the doctrine of *West Brothers., Inc.* The situation is similar when protestants have failed to demonstrate that a grant of the direct service requested would cause

> sufficient harm to their operations. The mere existence of fit, willing, and able existing carriers does not create a presumption that the addition of a new carrier will have an adverse competitive effect.
>
> In sum, we believe that the *Childress* criteria should be applied to related applications flexibly so as not to negate the practicality of consummating a section 5 transaction. The related application should be denied only when the record clearly demonstrates that there will be significant adverse impact upon the competitive structure along the direct route. This approach provides more protection for existing carriers than they had prior to the gateway elimination proceeding when a through service by 'tacking,' though circuitous, was generally viewed to be a right." (122 M.C.C. at 793-795)

Not only did the Court below fail to recognize this distinction in gateway elimination proceedings, it also failed to give consideration to the so-called "20% test" set forth in 49 C.F.R. § 1065.1 as discussed and applied in the *McNicholas—Tom's* case, *supra.* This test, in effect states that the *Childress* criteria are not applicable at all to gateway eliminations which are within "the 20% rule presumption." See 122 M.C.C. at page 793.

Further, in substituting its judgment for that of the ICC on purely factual issues, the Court below has failed to consider that the opposing carriers conceded (opening Brief of Petitioners, page 2) that there was evidence of record showing support for 484 of the 741 segments of authority granted, i.e., 65%. Such concession, when considered in light of this Court's interpretation of the territorial evidentiary requirements

in *Alton Railway, supra,* clearly establishes the error of the Court below in partially vacating the Orders of the ICC.

CONCLUSION

For the reasons above stated, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 77-1389

C & H Transportation Co., Inc., Daily Express, Inc., & Dallas & Mavis Forwarding Co., Inc., *Petitioners*

v.

Interstate Commerce Commission & United States of America, *Respondents*

Ace Doran Hauling & Rigging Co., Home Transportation Company, Inc., Aero Trucking, Inc., Miller's Motor Freight, Inc., Wales Transportaton, Inc., J. H. Rose Truck Line, Inc., et al., *Intervenors*

Petition for Review of Order of the Interstate Commerce Commission

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Argued April 27, 1978

Decided October 10, 1978

William A. Chesnutt for petitioners.

Carl E. Howe, Jr., Attorney, Interstate Commerce Commission, with whom *Mark L. Evans*, General Counsel,

Charles H. White, Jr., Associate General Counsel, Interstate Commerce Commission, and *James F. Ponsoldt*, Attorney, Department of Justice, were on the brief, for respondents.

John P. McMahon was on the brief for intervenor, Aero Trucking, Inc.

James M. Doherty and *Robert J. Birnbaum* were on the brief for intervenor, J. H. Rose Truck Line, Inc.

J. Michael Alexander was on the brief for intervenors, Wales Transportation, Inc., & H. J. Jeffries Truck Line, Inc.

Jeffrey Kohlman was on the brief for intervenor, Home Transportation Company, Inc.

Jeremy Kahn and *S. Harrison Kahn* entered appearances for intervenor, Miller's Motor Freight, Inc.

William A. Chesnutt also entered an appearance for intervenor, Ace Doran Hauling & Rigging Co.

Carl D. Lawson and *James F. Ponsoldt*, Attorneys, Department of Justice, entered appearances for respondent, United States of America.

Before DANAHER, *Senior Circuit Judge*, and TAMM and WILKEY, *Circuit Judges*.

Opinion for the court filed by *Circuit Judge* TAMM.

TAMM, *Circuit Judge:* This appeal seeks to set aside orders of the Interstate Commerce Commission (Commission) authorizing a gateway elimination in conjunction with the grant of an application to purchase motor carrier authority. Because we find that a portion of the Commission's broad authorization is not supported by substantial evidence, we vacate the Commission's orders in part and remand for further proceedings.

Background

Prior to 1974, the Commission permitted irregular-route motor carriers [1] holding two or more separate unrestricted grants of operating authority having a common point, or "gateway," to "tack," or join, those separate authorities. As long as the gateway was traversed, the carrier could provide through service between points contained in the separate authorities.[2]

Inefficient use of limited fuel resources resulted from the circuity frequently involved in tacking. In response to national concern for energy conservation, 41 Fed. Reg. 2459 (1976), the Commission revised its policy and promulgated restrictive tacking and gateway elimination rules. 49 C.F.R. § 1065 (1977).[3] The thrust of the policy is twofold—to conserve diminishing resources by authorizing necessary service as directly as possible without unduly disrupting the competitive status quo. As relevant to this case, the rules prohibit tacking unless the applicant proves, in accordance with the standards of section 207 of the Interstate Commerce Act (Act), 49 U.S.C. § 307 (1970), that public con-

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[1] "Irregular-route" carriers are those authorized to operate between designated locations without restriction as to the route or highway to be traversed. Ex parte No. MC-10, Classification of Motor Carriers of Property, 2 M.C.C. 703, 709 (1937).

[2] For example, a carrier authorized to go from point A to point B and from point B to point C could provide service from point A to point C as long as it passed through B.

[3] The rules were adopted in Ex parte No. 55 (Sub-No. 8), Motor Common Carriers of Property, Routes & Service, 119 M.C.C. 530 (1974), and upheld against attack in Thompson Van Lines, Inc. v. United States, 399 F. Supp. 1131 (D.D.C. 1975), *aff'd mem.*, 423 U.S. 1041 (1976), and Common Carrier Conference—Irregular Route v. United States, 534 F.2d 981 (D.C. Cir.), *cert. denied*, 429 U.S. 921 (1976).

venience and necessity require through service.[4] If such a showing is made, the gateway is eliminated and direct authority is issued. 49 C.F.R. § 1065.1(b).

The requisite showing of public convenience and necessity may be made in either of two ways: (1) in the traditional manner, through public testimony that the proposed authority will fulfill public need which cannot be satisfied by existing service, and, in so doing, will not affect operations of other carriers in a manner contrary to the public interest, *see Pan-American Bus Lines Operation,* 1 M.C.C. 190, 203 (1936); or, in the absence of such evidence, (2) through proof that special gateway elimination criteria have been met. *See F-B Truck Line Co., Extension—Colorado/Utah,* 128 M.C.C. 628, 635 (1978); *Gray Moving & Storage, Inc.—Purchase (Portion)—Thomas C. Warner,* 122 M.C.C. 316, 330 (1976). The gateway elimination criteria, first announced in *Childress—Elimination Sanford Gateway,* 61 M.C.C. 421, 428 (1952), and found by the Commission to be applicable under the new rules in *Ex parte No. 55 (Sub.-No. 8), Motor Common Carriers of Property, Routes & Service,* 119 M.C.C. 530, 543, 550 (1974), require proof that:

> (1) . . . applicant is actually transporting a substantial volume of traffic from and to the points involved by operating in good faith through the gateway and, in so operating, is effectively and efficiently competing with the existing carriers, and (2) . . . the elimination of the gateway requirement would [not] enable applicant to institute a new service or a service so different from

[4] These rules apply when the applicant already owns separate grants of authority and also when, as in this case, the applicant extends its authority by acquiring other existing route rights. Ex parte No. 55 (Sub.-No. 8), Motor Common Carriers of Property, Routes & Service, 119 M.C.C. at 552-53.

> that presently provided as to materially improve applicant's competitive position to the detriment of existing carriers.

61 M.C.C. at 428.

Facts

In October 1974, Aero Trucking, Inc. (Aero), an intervenor in this appeal, filed an application under section 5(2) of the Act, 49 U.S.C.A. § 5(2) (1978),[5] for approval of the purchase of the Sub.-No. 33 operating rights of Miller's Motor Freight, Inc. (Miller's). Miller's was authorized to transport "size and weight"[6] commodities from points within ten miles of York, Pennsylvania, to all points in the United States, with several exceptions.[7] In connection with this application, on January 29, 1975, Aero sought, pursuant to section 207(a) of the Act, 49 U.S.C. § 307(a) (1970),[8] to combine Miller's authority with the authority it already

[5] 49 U.S.C.A. § 5(2)(a) (1978) in pertinent part provides: "It shall be lawful, with the approval and authorization of the Commission . . . (i) . . . for any carrier . . . to purchase . . . the properties, or any part thereof, of another . . . ."

[6] The "size and weight" commodity classification is a generic description for heavy and cumbersome articles.

[7] Those exceptions were Alaska, Hawaii, Connecticut, Delaware, Maryland, New Jersey, New York, Ohio, Pennsylvania, points in Virginia, points in West Virginia, and the District of Columbia. Joint Appendix (J.A.) I at 56.

[8] 49 U.S.C. § 307(a) (1970) states that "a certificate shall be issued to any qualified applicant therefor . . . if it is found that . . . the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied."

held and to eliminate the resulting gateway at York. A grant of both applications would authorize Aero to provide direct-route service from points in the eighteen states [9] and the District of Columbia contained within its existing authority, to points in the thirty-nine states included in the authority it sought to acquire. Joint Appendix (J.A.) II at 845, 980.

Nine shippers supported Aero's applications;[10] thirteen carriers were in opposition.[11] Hearings were held before an administrative law judge (ALJ) in July and August, 1975. An initial decision, served on December 11, 1975, granted both applications. *Id.* at 844-71. On September 24, 1976, a three-Commissioner Division 3, in the main accepted the ALJ's decision, but modified slightly the territorial scope of the authority granted.[12] Petitions for further reconsideration were denied on February 24, 1977. *Id.* at 1029. Petitioners then sought review in this court of the Commission's grant of Aero's section 207 application.[13]

[9] Aero was authorized to serve all or some of the points in the following states: Ohio, Pennsylvania, New York, New Jersey, Virginia, West Virginia, Indiana, Illinois, Michigan, Wisconsin, Connecticut, Massachusetts, Rhode Island, New Hampshire, Vermont, Maine, Delaware, and Maryland. J.A. I at 57-63; J.A. II at 845.

[10] Bethlehem Steel Corp.; Universal Cyclops Specialty Steel Division; Jones & Laughlin Steel Corp.; Grove Manufacturing Co.; Elwin J. Smith Division of Cyclops Corp.; Wheeling-Pittsburgh Steel Corp.; Gibson Motor & Machine Service, Inc.; Colt Industries, Crucible, Inc.; and United States Steel Corp.

[11] Ace Doran Hauling & Rigging Co.; C & H Transportation Co., Inc.; Daily Express, Inc.; Dallas & Mavis Forwarding Co.; Hennis Freight Lines, Inc.; Home Transportation Co., Inc.; International Transport, Inc.; H. J. Jeffries Truck Line, Inc.; Mercury Motor Express, Inc.; Moss Trucking Co., Inc.; J. H. Rose Truck Line, Inc.; Vance Trucking Co.; and Wales Transportation, Inc. C & H Transportation Co., Inc.; Daily Express, Inc.; and Dallas & Mavis Forwarding Co. are petitioners in this Court. Others of the opponent carriers are intervenors.

Review of the Commission's Orders

A. Scope of Review

The Administrative Procedure Act requires that the reviewing court set aside all agency action that is unsupported by substantial evidence in those cases subject to 5 U.S.C. §§ 556 & 557 (1976). 5 U.S.C. § 706(2)(E) (1976). A section 207 application invokes the adjudicatory procedures of sections 556 and 557, *see* 5 U.S.C. § 558(c) (1976), and our review is therefore governed by the strictures of the substantial evidence test. We conclude that the major portion of the Commission's orders cannot withstand the scrutiny of this standard.

In so ruling, we are mindful of the restricted scope of our review and of the broad discretion traditionally lodged in the Commission when determining issues of public convenience and necessity. *See United States* v. *Pierce Auto Freight Lines, Inc.*, 327 U.S. 515, 535-36 (1946); *ICC* v. *Parker*, 326 U.S. 60, 65 (1945). Nonetheless, the Commission's discretion under section 207 is not limitless, *see Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 167-68 (1962), nor can it be shielded from "thorough, prob-

[12] The notice published in the Federal Register on April 4, 1975, 40 Fed. Reg. 15142, incorrectly included New York as a destination state and excluded Massachusetts and Vermont as origin states. J.A. II at 979-80. The modification was necessary to correct these errors.

[13] Petitioners do not challenge the Commission's orders authorizing the section 5 purchase of Miller's rights. They attack only those orders pertaining to the York, Pennsylvania gateway elimination.

ing, in-depth review." *Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402, 415 (1971).

A careful review of the record shows that the proffered evidence is fatally deficient and will not support the award of direct-route authority between all of the jurisdictional origin and destination points encompassed within the Commission's orders. Aero submitted two traffic studies as well as public testimony in support of its application. The ALJ and thereafter Division 3 concluded that the studies satisfied the special gateway elimination criteria set forth in the *Childress* case, and that the testimony met the rigors of the traditional, and independent, public convenience and necessity test. J.A. II at 866-69. We find, however, that a substantial number of the more than 600 new direct-route authorities granted, *see* note 14 *infra,* are without any evidentiary foundation—there is no public testimony pertaining to them, nor are the *Childress* criteria met. We further find the evidentiary basis for many of the remaining authorities inadequate in more than one respect.

B. Public Testimony

The ALJ concluded that the testimony presented by the nine supporting shippers demonstrated that public convenience and necessity required elimination of the gateway. J.A. II at 869. Review of the record reveals, however, that the evidence adduced through these witnesses falls far short of the "substantial evidence" necessary to uphold the Commission's orders in their entirety.

The geographic scope of the shippers' testimony is extremely limited. Of the nine shippers, three—Jones & Laughlin Steel Corp., *id.* at 852; Elwin J. Smith Division of Cyclops., *id.;* and Colt Industries, Crucible, Inc., *id.* at 854; —support Aero's application only insofar as it pertains to the shipment of commodities from Pennsylvania to North Carolina, South Carolina, Georgia, and Florida. Bethlehem Steel Corp., *id.* at 851, expressed a need for transportation

from Pennsylvania to these four destination states, and additionally to Alabama. Universal Cyclops Specialty Steel Division, *id.* at 851-52, supports Aero's application as it relates to shipments from Pennsylvania and Ohio to North Carolina, South Carolina, Georgia, Florida, and Louisiana.

The remaining shippers claim a generalized need for national service. Of those four, Gibson Motor & Machine Service, Inc., *id.* at 854, requires transportation only from a single point in Massachusetts; and Grove Manufacturing Co., *id.* at 852, solely from one point in Pennsylvania. The testimony presented by Wheeling-Pittsburgh Steel Corp. and United States Steel Corp., while broader territorially, is still manifestly restricted. Wheeling-Pittsburgh Steel Corp. testified to a need for transportation from points in Pennslyvania, Ohio, and West Virginia to points throughout the nation. *Id.* at 853-54. United States Steel Corp. expressed a requirement for service from points in Illinois, Indiana, New Jersey, Ohio, and Pennsylvania to points throughout the United States. *Id.* at 855.

The testimony of these nine witnesses can be construed, at best, as favoring a grant of direct authority only between those states to which they specifically refer. This testimony cannot be read however, as establishing a public need for service to and from all of the states authorized by the Commission.[14] *See Pre-Fab Transit Co. Extension—Alaska,* 82 M.C.C. 72, 74 (1959).

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[14] Of the 741 combinations of direct authority granted in the Commission's orders, Aero already holds authority for over 100. *See* J.A. II at 910-11. Of the some 600 new direct-route authorities granted, we can find no reference in the testimony of any of the witnesses to over one-third of these combinations:

FROM points in Delaware, Maryland, Virginia, and the District of Columbia

TO points in Arizona, Arkansas, Idaho, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nevada, New York, North

The shippers' testimony is not only territorially restricted, but it is also substantively deficient in several re-

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Carolina, North Dakota, Oregon, South Carolina, South Dakota, Utah, and Wyoming;

FROM points in Connecticut

TO points in Alabama, Georgia, Idaho, Iowa, Kansas, Louisiana, Minnesota, Mississippi, Montana, Nebraska, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, and Wyoming;

FROM points in New Hampshire

TO points in Alabama, Georgia, Idaho, Iowa, Kansas, Louisiana, Maine, Minnesota, Mississippi, Montana, Nebraska, New Hampshire, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Vermont, and Wyoming;

FROM points in Vermont

TO points in Alabama, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Montana, Nebraska, New Hampshire, New Mexico, North Dakota, Oklahoma, Oregon, Rhode Island, South Dakota, Vermont, Wisconsin, and Wyoming;

FROM points in Michigan

TO points in Alabama, Arizona, Arkansas, California, Colorado, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, South Carolina, South Dakota, Tennessee, Texas, Utah, Washington, Wisconsin, and Wyoming;

FROM points in Wisconsin

TO points in Alabama, Arizona, Arkansas, California, Colorado, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Mexico, North Caroline, North Dakota, Oklahoma, Oregon, South Carolina, South Dakota, Tennessee, Texas, Utah, Washington, Wisconsin, and Wyoming;

FROM points in Maine

TO points in Alabama, Arizona, Arkansas, California, Colorado, Florida, Georgia, Idaho, Iowa, Kansas, Kentucky, Louis-

spects. The elements necessary to establish public convenience and necessity in motor carrier operations are set out in *Pan-American Bus Lines Operations,* 1 M.C.C. at 203:

> The question, in substance, is whether the new operation or service will serve a useful public purpose, responsive to a public demand or need; whether this purpose can and will be served as well by existing lines or carriers; and whether it can be served by applicant with the new operation or service proposed without endangering or impairing the operations of existing carriers contrary to the public interest.

Satisfaction of this standard generally requires a showing that one or more shippers desire transportation of the type sought to be authorized and that their plans to use the service are reasonably definite. In this regard, shippers supporting an application for motor carrier authority must " 'identify clearly the commodities they ship or receive, the points to or from which their traffic moves, the volume

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iana, Maine, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Washington, and Wyoming;

FROM points in Rhode Island

TO points in Alabama, Arizona, Arkansas, California, Colorado, Florida, Georgia, Idaho, Iowa, Kansas, Kentucky, Louisiana, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Washington, and Wyoming.

We also note that Gibson Motor & Machine Service, Inc. testified to a need for transportation from Lawrence, Massachusetts. *Id.* at 854. This can hardly be construed as evidence of public need requiring authorization of direct-route travel from *all* points in Massachusetts as was granted.

of freight they would tender to applicant, the transportation services now used for moving their traffic, and any deficiencies in existing services.' " *Novak Contract Carrier Application,* 103 M.C.C. 555, 557 (1967). These are not merely "technical requirements," as characterized by the ALJ. *See* J.A. II at 869. Rather, they constitute, in the Commission's own words, "the minimal showing expected of any applicant seeking a grant of motor carrier authority," *Novak Contract Carrier Application,* 103 M.C.C. at 557, and are meant to assure that sufficient information will be available to determine the nature and extent of the transportation needs of the shippers. *See Ashworth Transfer, Inc., Extension—Explosives,* 111 M.C.C. 860, 866 (1970).

By the ALJ's own admission, the testimony offered in this case was "somewhat general." J.A. II at 869. Several witnesses failed to identify the specific volumes of freight to be shipped through Aero to particular points.[15] United States Steel Corp., which claimed the broadest territorial needs, failed to express any dissatisfaction with the present carriers. Similarly, Elwin J. Smith Division of Cyclops Corp., Colt Industries, and Universal Cyclops Specialty Steel Division could not point to any inadequacies in existing service. The complaints asserted by the other shippers proved uniformly vague, undocumented, and insubstantial.[16]

[15] United States Steel Corp., for example, submitted evidence of gross tonnage traveling from several origin points to the thirty-nine destination states. A detailed break down of the shipment figures was not offered, rendering it impossible to determine the quantum of traffic moving between the pertinent states. *Id.* at 855. The testimony of Bethlehem Steel Corp. and Universal Cyclops Specialty Steel Division suffers from similar deficiencies. *Id.* at 851.

[16] While we recognize that a finding of inadequacy of existing service is not always indispensable to the conclusion that the proposed service comports with public convenience and necessity, *cf.* United States v. Dixie Highway Express, Inc., 389 U.S. 409, 411 (1967) (per curiam), it is, nevertheless, an important factor in any section 207 determination and has been given considerable

weight in gateway elimination cases. This factor warrants particular attention in view of the broad authorization sought by Aero and the imprecision of the testimony in general.

[17] Jones & Laughlin Steel Corp.; Edwin J. Smith Division of Cyclops Corp.; Colt Industries, Crucible, Inc.; Bethlehem Steel Corp.; Universal Cyclops Specialty Steel Division; Wheeling-Pittsburgh Steel Corp.; and United States Steel Corp.

See Squaw Transit Co. v. United States, 574 F.2d 492, 494, (10th Cir. 1978); *C.A. White Trucking Co. v. United States,* 555 F.2d 1260, 1264-65 (5th Cir. 1977). We are constrained to note that the size of some of the shippers seems to have been more influential than their demonstrated needs. *See* J.A. II at 869. Such emphasis is misplaced and will not support a finding of public convenience and necessity sufficient to uphold the broad authorization granted by the Commission. See *Ashworth Transfer, Inc., Extension—Explosives,* 111 M.C.C. at 865.

Analyzed in its entirety, the shippers' testimony can be construed only as demonstrating that public convenience and necessity require direct-route authority from points in Pennsylvania and Ohio to points in North Carolina, South Carolina, Florida, and Georgia. Seven of the nine[17] testified to a need for direct service between these states with adequate precision. Substantial evidence is found in the record to justify elimination of the York gateway with respect to transportation between these groups of states, and we accordingly affirm the Commission's orders to this extent. In the absence of public testimony sufficient to uphold the remainder of the award, we turn to an examination of the criteria set forth in the *Childress* case to determine whether the evidence contained in the record meets those tests.

C. The *Childress* Criteria

The plain language of the first *Childress* criterion requires, at a minimum, that prior traffic have traveled *through* the pertinent gateway. 61 M.C.C. at 428.

Of the two traffic studies offered by Aero, the first, and most important, consisted of an abstract of 2,224 shipments [18] which moved from some of the nineteen origin areas to some of the thirty-nine destination states by means of joint-line motor carrier services in which Aero was a participant during 1969-75. J.A. I at 68-131. Of these 2,224 shipments, over one-half moved between origin and destination points for which Aero already held direct single-line authority, *see* note 9 *supra;* and, therefore are not significant.

There is no evidence that *any* of the shipments abstracted in the first study were interchanged at York, Pennsylvania, the only gateway relevant in these proceedings.[19] The ALJ, although quoting extensively from the *Childress* case, J.A. II at 867-68, and relying primarily on this study in determining that those criteria were satisfied, *id.* at 868, failed to find that use was made of the gateway. The ALJ concluded only that there was "substantial interline activity on the part of [Aero] in the involved area and . . . that there was considerable demand for joint-line service into the area." *Id.* This will not satisfy the clear requirements of the first *Childress* test which demands actual utilization of the gateway. *See Incorporated Carriers, Ltd. —Gateway Elimination,* 128 M.C.C. 810, 816 (1978); *Interstate Motor Freight System Extension—Moline, Ill.,* 125

[18] The administrative law judge based his analysis of this study on the incorrect conclusion that the study contained 2,242 shipments. J.A. II at 868. Eighteen numerical entries in the abstract, however, did not represent shipments which had actually been made. See entries 61, 156, 160, 217, 235, 251, 252, 267, 268, 272, 306, 308, 321, 323, 371, 391, 825, 827.

[19] Neither the Commission nor Aero contended, either in their brief or at oral argument, that the York gateway had in fact been traversed. We therefore accept petitioners' assertion that the traffic did not pass through the York gateway. *Cf.* Chem-Haulers, Inc. v. ICC, 565 F.2d 728, 730 n.12 (D.C. Cir. 1977).

M.C.C. 754, 761, (1976). To the extent that the Commission's orders rest on this study, they cannot be upheld.

The second traffic study considered by the ALJ abstracted 587 shipments transported by Aero from November 25, 1974, to June 30, 1975, under a temporary lease of Miller's authority. 49 U.S.C. § 310a(b) (1970); J.A. I at 144-73. Although most of these shipments passed through the York gateway, J.A. II at 850, they represent only some fifty of the over 600 new direct authorities awarded in this case. The study is thus manifestly deficient. As the Commission has explained, "it is not enough to show that between selected points applicant has transported substantial traffic," rather the proposing carrier must show that it is an "effective competitor as to substantially all points encompassed within the scope of its pertinent outstanding authority." *Maryland Transportation Co. Extension—Specified Commodities,* 83 M.C.C. 451, 455 (1960). Traffic related to only some fifty pairs of origin and destination states cannot rationally support a finding of transportation between *substantially all* of the over 600 new pairs encompassed within the scope of Aero's application.

Two further inadequacies preclude our finding this study sufficient justification for the Commission's orders either in whole or in part. First, the ALJ failed to determine whether the shipments made between designated points constituted "a substantial volume of traffic" through the gateway within the meaning of *Childress.* 61 M.C.C. at 428. About 400, or approximately sixty-eight percent, of the shipments abstracted moved from points in Pennsylvania and Ohio to points in North Carolina, South Carolina, Florida, and Georgia. We have already held that public testimony sufficient to justify elimination of the gateway with respect to these pairs of states. Only one or two shipments, however, were made between most of the remaining pairs of states. The finding of substantiality, crucial to any determination of compliance with *Childress,* becomes even more important when single and double shipments are involved. We

therefore remand to the Commission for an explication of its substantiality criteria and a specific determination of whether the shipments abstracted in the second study meet those tests. *See Burlington Truck Lines, Inc. v. United States,* 371 U.S. at 167-68.

Second, the ALJ failed to analyze the effects of eliminating the gateway on Aero's competitive position. The second test set out in *Childress* requires proof that elimination of the gateway will not "enable applicant to institute a new service or a service so different from that presently provided as to materially improve applicant's competitive position to the detriment of existing carriers." 61 M.C.C. at 428. Mileage distances under present operations as compared with those proposed are to be considered in evaluating the effect on the competitive status quo. *Id.* In *Childress,* the Commission found that a mileage saving of twenty-three to twenty-nine percent where a one way movement was 300 miles or more constituted a new service. *Id.* Similarly, in *Hermann Forwarding Co. Extension—Pomona, N.J.,* 99 M.C.C. 476, 479-80 (1965), the Commission denied a gateway elimination application on the ground that a ninety-one mile reduction that enabled the carrier to provide same day service constituted a new service and altered the competitive balance. *See, e.g., Overnite Transportation Co. Elimination of Gateway—Monroe, N.C.,* 103 M.C.C. 135, 149-51 (1966); *Chicago Express, Inc., Extension—Tuscola, Ill.,* 79 M.C.C. 384, 385-86 (1959).

Enormous time and mileage savings will result from a complete grant of Aero's application.[20] Yet, the ALJ neglected even to address this issue. The ALJ's conclusory statement that the elimination of the gateway will not give rise to new service, J.A. II at 868, does not comport with the Commission's interpretation of the demands of the second *Childress* requirement.[21] On remand, the mileage savings encompassed within the grant of Aero's application must be reconciled with the criteria and analytic methods, established in prior Commission decisions. Unfortunately, this court is again called upon to admonish the Commission that it must conform to its own precedents or explain its departure from them. *See Greyhound Corp. v. ICC,* 551 F.2d 414, 416 (D.C. Cir. 1977) (per curiam).

[20] The contesting carriers point out, for example, that the Commission's authorization of service from all points in Wisconsin to all points in thirty-nine states results in mileage reductions that vary from 46.48 to 63.49 percent; and elimination of the York gateway in trips from Chicago, Illinois entails as much as 70.44 percent circuity savings. Brief for Intervenor-Petitioner Home Transportation Co., Inc. at 15.

Viewing the record as a whole, we are able to uphold the Commission's orders only insofar as they award direct-route authority from points in Pennsylvania and Ohio to points in North Carolina, South Carolina, Florida, and Georgia. The remaining direct-route authorization sought by Aero are not supported by substantial evidence. Indeed, our analysis reveals that there is no mention anywhere in the record—either in the traffic studies or in the witnesses' testimony—of approximately 200 of the jurisdictional pairings authorized by the Commission.[22] Before concluding, however, a note concerning methodology is in order.

[21] Evaluation may well show that elimination of the gateway with regard to some of the direct authorities represented in the second study is justified. Indeed, we note that the minimal circuity involved in shipments to several pairs of states abstracted in the study seem to indicate that elimination of the gateway will not disrupt existing competitive relations between carriers. We cannot, however, substitute our evaluation of this data for that of the Commission.

[22] FROM points in Virginia and the District of Columbia
TO points in Arizona, Arkansas, Idaho, Illinois, Indiana, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Mississippi, Missouri, Montana, Nevada, New Hampshire, New York, North Carolina, North Dakota, Oregon, Rhode Island, South Carolina, South Dakota, Utah, Vermont, Wisconsin, and Wyoming;

Methodology

Respondents vigorously challenge the validity of an analysis based upon all possible origin and destination permutations and combination encompassed within an award. Joint Brief for the Commission and the United States of America at 221-22; Brief of Intervening Respondent Aero at 13-14. They argue that the sporadic nature of call-on-

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FROM points in Maryland

TO points in Arizona, Arkansas, Illinois, Indiana, Kentucky, Maine, Massachusetts, Michigan, Mississippi, Montana, Nevada, New Hampshire, New York, North Carolina, North Dakota, Oregon, Rhode Island, South Carolina, South Dakota, Utah, Vermont, Wisconsin, and Wyoming;

FROM points in Delaware

TO points in Arizona, Arkansas, Idaho, Illinois, Indiana, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Mississippi, Missouri, Montana, Nevada, New Hampshire, New York, North Dakota, Oregon, Rhode Island, South Carolina, South Dakota, Utah, Vermont, Wisconsin, and Wyoming;

FROM points in Connecticut and Vermont

TO points in Alabama, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Montana, Nebraska, New Hampshire, New Mexico, North Dakota, Oklahoma, Oregon, Rhode Island, South Dakota, Vermont, Wisconsin, and Wyoming;

FROM points in New Hampshire

TO points in Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Montana, Nebraska, New Hampshire, New Mexico, North Dakota, Oklahoma, Oregon, Rhode Island, South Dakota, Vermont, Wisconsin, and Wyoming;

FROM points in Michigan

TO points in Alabama, Arizona, Arkansas, California, Colorado, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, Rhode Island, South Dakota, Tennessee, Texas, Utah, Vermont, Washington, Wisconsin, and Wyoming;

demand shipments of "size and weight" commodities renders unrealistic the requirement that evidence be offered pertinent to all states within a grant of authority. In effect, they contend that evidence supplied with respect to some of the states justifies elimination of the gateway and direct-route authorization as to all. Given the broad authority sought in this case, we cannot agree.

We are unpersuaded by the numerous cases cited by respondents in support of their proposition. These cases deal exclusively with proceedings under section 5(2) of the Act, 49 U.S.C. § 5(2) (1978), and are not dispositive in a section 207 inquiry. Section 5 requires that a carrier seeking to acquire the rights of another satisfy a "public interest" standard.[23]

A showing that adequately meets section 5(2), however, may not necessarily meet the more stringent requirements of section 207. Whereas section 5(2) only demands demonstration of "public interest," section 207 requires a showing of "public convenience and necessity." As this Court

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FROM points in Wisconsin

TO points in Alabama, Arizona, Arkansas, California, Colorado, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Washington, Wisconsin, and Wyoming.

[23] In determining whether a transaction under this section is consistent with the public interest, the carrier must establish that the authority sought to be acquired is not dormant by demonstrating substantial service within the area authorized. The test of substantiality does not require a showing of service from every point contained within the authority. Shipment to a representative number of points within the area suffices to refute a dormancy challenge and justify a section 5 acquisition. *Central Transport, Inc.—Purchase (Portion)—Piedmont Petroleum Products, Inc.*, 127 M.C.C. 1, 9-10 (1977).

has previously noted, the standard of public convenience and necessity is higher than that of public interest. *Common Carrier Conference—Irregular Route v. United States,* 534 F.2d 981, 983 (D.C. Cir.), *cert. denied,* 429 U.S. 921 (1976). *See J.V. McNicholas Transfer Co.—Control—Tom's Express,* 122 M.C.C. 786, 792 (1977); *Baggett Transportation Co.—Purchase—W.A. Bishop,* 36 M.C.C. 659, 663-64 (1941); *see also Refrigerated Transport, Co. v. ICC,* 552 F.2d 1162, 1169 n.6 (5th Cir. 1977). Although atomization may be contrary to well-established precedent in motor carrier acquisition cases that is not to say the same applies in gateway elimination actions. The Commission has in the past uniformly applied, at the least, a state by state analysis of each proposed authority in gateway elimination cases, *see, e.g., Central Transport, Inc.—Purchase (Portion)—Piedmont Petroleum Products, Inc.,* 127 M.C.C. 1, 22-23 (1977); *Service Trucking Co., Extension—Frozen Pies & Pastries,* 88 M.C.C. 697, 701 (1962); *Maryland Transportation Co., Extension—Specified Commodities,* 83 M.C.C. at 455, as we have recognized, *see Youngstown Cartage Co. v. ICC,* 571 F.2d 1243, 1244 (D.C. Cir.), *cert. denied,* —— U.S. —— (Oct. 2, 1978) (No. 77-1651); *Chem-Haulers, Inc. v. ICC,* 565 F.2d 728, 731 (D.C. Cir. 1977). *See also Squaw Transit Co. v. United States,* 574 F.2d at 495; *C.A. White Trucking Co. v. United States,* 555 F.2d at 1264.

The Commission's recent decision in *Groendyke Transport, Inc., Extension—Gateway Elimination,* 126 M.C.C. 571 (1977), fully supports our analysis. The *Groendyke* case is analogous to that presently before us. The application filed in that case, as in this, was "overbroad" in terms of the territories sought. *Id.* at 575. The Commission employed an analytic method identical to ours and reached a similar result, ruling that the entire gateway elimination was improper because "applicants ha[d] not shown that it ha[d] moved any traffic from and to many of the points sought." *Id.* at 575. In concluding that a "full grant of territorial authority was not warranted, particularly with respect to operations from [various states] from which . . .

applicant handled only sporadic movements," *id.* at 576, the Commission's decision is fully consistent with our conclusion here.

We are inclined to view the lack of evidence in this case, not as the result of the sporadic nature of the "size and weight" shipments, as respondents suggest, but rather as the manifestation of the operational and economic disabilities involved in gateway observance which have prevented Aero from effectively competing with petitioners. A grant of direct authority between points for which Aero has not actually transported traffic through the gateway and for which there is no public testimony demonstrating public convenience and necessity may result in an unjustified windfall to Aero, inconsistent with both the explicit standard of section 207 as well as the purpose of the gateway elimination rules. *See* text *supra* at 1.

Conclusion

In remanding this case, we recognize the wide latitude afforded the Commission in determining issues of public convenience and necessity. We do not undertake to substitute our judgment for theirs. Rather, our observations are intended to emphasize that the record, as supplied thus far, does not support the scope of the decision reached by Division 3. This is not a case going solely to an evaluation of the weight of the evidence, but instead, one that involves, in part, a complete lack of evidence in the particulars we have specified. While the record justifies a grant of direct authority from points in Pennsylvania and Ohio to points in North Carolina, South Carolina, Florida, and Georgia, it is plainly insufficient to support the remainder of the award. Accordingly, we vacate the orders under review insofar as they grant direct authority beyond that set out immediately above and remand the case to the Commission to conduct proceedings consistent with this opinion.

Vacated in parts and remanded.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1978

No. 77-1389

Filed October 31, 1978

C & H Transportation Co., Inc., Daily Express, Inc., and Dallas & Mavis Forwarding Co., Inc., *Petitioners*

v.

Interstate Commerce Commission and United States of America, *Respondents*

Ace Doran Hauling & Rigging Co., Home Transportation Company, Inc., Aero Trucking, Inc., Miller's Motor Freight, Inc., et al., *Intervenors*

Before: Danaher, *Senior Circuit Judge;* Tamm and Wilkey, *Circuit Judges*

Order

Upon consideration of the petition for rehearing filed by intervenor (Aero Trucking, Inc.), it is

Ordered, by the Court, that intervenor's aforesaid petition is denied.

Per Curiam

For the Court

/s/ George A. Fisher
George A. Fisher
Clerk

APPENDIX C-1

Order

At a Session of the Interstate Commerce Commission, Division 3, acting as an Appellate Division, held at its office in Washington, D.C., on the 10th day of February, 1977.

No. MC-F-12331

Aero Trucking, Inc.—Purchase (Portion)—Miller's Motor Freight, Inc.

No. MC-60014 (Sub-No. 38)

Aero Trucking, Inc., Elimination of Gateway—York, Pa.

Upon consideration of the record in the above-entitled proceeding, including (1) the initial decision served December 19, 1975, (2) the decision and order of Division 3, served September 24, 1976, (3) the petitions for reconsideration (a) filed jointly October 15, 1976, by protestants Home Transportation Co., Inc., and Mercury Motor Express, Inc., (b) filed October 26, 1976, by protestant Moss Trucking Company, Inc., (c) filed November 10, 1976 by protestant J. H. Rose Truck Lines, Inc., (d) filed jointly November 10, 1976, by protestants H. J. Jeffries Truck Lines, Inc., and Wales Transportation, Inc., (e) filed jointly November 10, 1976, by protestants Ace Doran Hauling & Rigging Co., Inc.; C&H Transportation Co., Inc.; Daily Express, Inc.; and Dallas & Mavis Forwarding Co., Inc., and (f) filed November 10, 1976, by protestants Vance Trucking Company, Inc., and (4) the reply to said petitions filed December 6, 1976, by applicants; and

It appearing, That the petitions for reconsideration set forth no material facts or arguments not considered by Division 3 in connection with its decision and order of

August 31, 1976, or which warrant reconsideration of that decision and order; and that reconsideration is not warranted:

It is ordered, That, the petitions for reconsideration be, and they are hereby, denied.

By the Commission, Division 3, acting as an Appellate Division, Commissioners Brown, MacFarland and Clapp.

ROBERT L. OSWALD
Secretary.

(SEAL)

APPENDIX C-2

INTERSTATE COMMERCE COMMISSION
Washington, D.C.

No. MC-F-12331

AERO TRUCKING, INC.—PURCHASE (PORTION)—MILLER'S MOTOR FREIGHT, INC.

No. MC-60014 (Sub-No. 38)

AERO TRUCKING, INC., ELIMINATION OF GATEWAY-YORK, PA.

NOTICE TO THE PARTIES: February 28, 1977

A paragraph setting the effective date was inadvertently omitted from the order of Division 3, Acting as an Appellate Division, served February 24, 1977. The following final "ordering" paragraph should be added to said order:

It is further ordered, That the Decision and Order of Division 3 served September 24, 1976 shall be, and it is hereby, effective 20 days after the date of service of this order.

ROBERT L. OSWALD,
Secretary.

APPENDIX C-3

Decision and Order

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 3, held at its office in Washington, D.C., on the 31st day of August, 1976.

No. MC-F-12331 [1]

AERO TRUCKING, INC.—PURCHASE (PORTION)—MILLER'S MOTOR FREIGHT

Upon consideration of the record in the above entitled proceeding and the initial decision of the Administrative Law Judge, served December 19, 1975, the exceptions of protestants individually by International Transport, Inc., Moss Trucking Company, Inc., J. H. Rose Truck Line, Inc., and jointly by (a) Ace Doran Hauling & Rigging Co., Inc., C & H Transportation Co., Inc., Daily Express, Inc., and Davis & Mavis Forwarding Co., Inc., (b) jointly by Home Transportation Co., Inc., and Mercury Motor Express, Inc., (c) jointly by H. J. Jeffries Truck Line, Inc., and Wales Transportation, Inc., and (d) jointly by Hennis Freight Lines, Inc., and Vance Freight Lines, Inc., and the reply by applicants;

It appearing, That the findings and conclusions of the Administrative Law Judge, except as hereinafter modified, are in all material respects proper and correct; that the exceptions and reply raise no new or material matters of fact or law not adequately considered and properly disposed of by the Administrative Law Judge in his report; and that the said exceptions and reply otherwise are not of such nature as to require the issuance of a report discussing the evidence in light of such pleadings;

It further appearing, That, by letter filed March 4, 1976, Spector Freight Systems, Inc., has requested that it be substituted for Hennis Freight Lines, Inc., as a party in these proceedings because Hennis was merged into Spector on December 31, 1975 (No. MC-F-12472);

[1] This proceeding embraces No. MC-60014 (Sub-No. 38), Aero Trucking, Inc., Elimination of Gateway—York, Pa.

It further appearing, That in No. MC-F-12331, Aero is purchasing authority from Miller that excludes New York from the destination territory; that, in No. MC-60014 (Sub-No. 38), the notice published in the Federal Register of April 4, 1975, in part 1(a), does not exclude New York as a destination State; and that applicants have failed to prove public need for service to New York;

It further appearing, That, in No. MC-60014 (Sub-No. 38), said Federal Register notice, in part 1(b), did not include Massachusetts and Vermont as origin States; and that applicants have shown a public need for direct service from those States; and good cause appearing therefor:

We find, That Spector Freight System, Inc., should be, and it is hereby, substituted for and in lieu of Hennis Freight Lines, Inc. in these proceedings;

We further find, That New York should be, and it is hereby, excluded from the destination territory in the awarded authority;

We further find, That Massachusetts and Vermont should be, and they are hereby, included as origin States in the awarded authority;

We further find, That, except as indicated above and in the appendix hereto, the evidence considered in the light of the exceptions and replies thereto does not warrant a result different from that reached by the Administrative Law Judge; that the statement of facts, the findings and the conclusions of the Administrative Law Judge, as modified herein being proper and correct in all material respects should be, and they are hereby, affirmed and adopted as our own; and that this decision is not a major Federal action significantly affecting the quality of the human environ-

ment within the meaning of the National Environmental Policy Act of 1969.

It is ordered, That the order of the Administrative Law Judge served December 19, 1975, as modified herein, be, and it is hereby, adopted as the order of the Commission, Division 3.

It is further ordered, That because the authority granted differed from the notice published in the Federal Register, publication of a supplemental notice is required and the effective date of this order will be deferred to allow persons interested in or prejudiced by the grant of authority set forth in the appendix hereto, to file an original and six copies of a petition or other pleading within 30 days from the date of publication with appropriate service on applicants; and that any such petition should set forth a precise manner of prejudice by the grant of authority herein.

It is further ordered, That the authority granted herein shall not be exercised prior to the effective date, and that this order shall be effective 35 days after notice is published in the Federal Register;

It is further ordered, That unless the authority herein granted is exercised within 180 days from the effective date hereof, this order shall be of no further force and effect.

By the Commission, Division 3, Commissioners Brown, MacFarland and Corber.

ROBERT L. OSWALD,
Secretary.

(SEAL)

APPENDIX

AUTHORITY AWARDED TO AERO TRUCKING, INC., IN NO. MC-60014 (SUB-NO. 38)

Commodities the transportation of which by reason of size or weight, require the use of special equipment,

From points in Wisconsin, Michigan, Illinois, Indiana, Ohio, West Virginia, Virginia, Maryland, Pennsylvania, Delaware, New Jersey, New York, Connecticut, Rhode Island, Massachusetts, Vermont, New Hampshire, Maine and the District of Columbia to points in the United States (except Alaska, Hawaii, Ohio, West Virginia, Virginia, Maryland, Pennsylvania, Delaware, New Jersey, New York, Connecticut and the District of Columbia).

APPENDIX D

No. MC-F-12331 et al.

(SEAL)

INTERSTATE COMMERCE COMMISSION
CERTIFICATE OF SERVICE

[Service Date December 19, 1975]

The SECRETARY of the Interstate Commerce Commission hereby certifies that the attached initial decision of the Administrative Law Judge has been filed with and duly made part of the record herein and has this date been served upon all known parties in the manner provided by law and the regulations of this Commission.

Exceptions to said decision, if any, must be filed with the Secretary, INTERSTATE COMMERCE COMMISSION, Washington, D.C. 20423, and served on all other parties of record within 30 calendar days (20 days if there are no other parties) from the date of service shown above. Replies thereto may be filed within 20 calendar days after the final date for filing exceptions. If either date falls upon a Saturday, Sunday, or legal holiday, then the applicable pleading must be filed by the end of the next business day.

If no exceptions are filed to the initial decision, and it is not stayed by the Commission, the initial decision becomes the order of the Commission by operation of law upon expiration of the period for filing of exceptions. The parties to this proceeding are warned that it should not be assumed that the initial decision has become effective as the order of the Commission by operation of law until a notice to that effect has been received.

In addition, any new operation to be authorized by the initial decision, if it becomes the order of the Commission by operation of law, may not be commenced until a certificate, permit, or license, as the case may be, has actually

been issued by the Commission. A certificate, permit, or license will not be issued until the applicant has complied with the provisions of the Interstate Commerce Act and the requirements of the Commission thereunder as specifically set forth in the initial decision.

/S/ ROBERT L. OSWALD
Secretary

INTERSTATE COMMERCE COMMISSION

Initial Decision

No. MC-F-12331 [1]
AERO TRUCKING, INC.—PURCHASE (PORTION)—
MILLER'S MOTOR FREIGHT, INC.

1. In No. MC-F-12331, purchase by Aero Trucking, Inc. of a portion of the operating rights of Miller's Freight, Inc. and acquisition of control of such rights by Edward J. Conto, Jack M. George, and James N. George through the purchase, approved and authorized, subject to conditions.
2. In No. MC-60014 (Sub-No. 38), issuance of certificate of public convenience and necessity authorizing described operations approved upon compliance with certain conditions, and application in all other respects denied.

S. Harrison Kahn, Jeremy Kahn, John P. McMahon and *A. Charles Tell* for applicants.

Kenneth R. Pepperney for Intervenor United States Steel Corporation in support of application.

William A. Chesnutt, Edward G. Villahon, Jon F. Hollengreen, Alan E. Foss, Morton E. Kiel, Robert N. Maxwell, J. Michael May, J. Michael Alexander, James A. Wilson, Robert E. Born and *James M. Doherty* for protestants.

By William J. Gibbons, Administrative Law Judge:

No. MC-F-12331: By joint application filed October 7, 1974, Aero Trucking, Inc. (Aero or vendee) of Monroeville, Pa., and Miller's Motor Freight, Inc. (Miller or vendor) of York, Pa. (sometimes referred to herein as applicants), seek authority under section 5 of the Inter-

[1] This decision embraces No. MC-60014 (Sub-No. 38), ***Aero Trucking, Inc., Elimination of Gateway—York, Pa.***

state Commerce Act for the purchase by the former of a portion of the operating rights of the latter for $200,000. By the same application, Edward J. Conto, Jack M. George and James N. George, who own the capital stock of vendee, seek authority under section 5 to acquire control of the operating rights through the purchase. Applicants' gross revenues from transportation subject to Part II of Act exceed $300,000 annually.

The authority proposed to be purchased by the vendee is contained in Miller's certificate No. MC-41915 (Sub-No. 33), which authorizes transportation, over irregular routes, of:

> "Commodities, which by reason of size or weight require the use of special equipment,
>
> From points within ten airline miles of York, Pa. including York, to points in the United States (except Alaska, Hawaii, Connecticut, Delaware, Maryland, New Jersey, New York, Ohio, Pennsylvania, points in that part of Virginia on and north of U.S. Highway 60, and on and east of U.S. Highway 11, points in that part of West Virginia on and north of U.S. Highway 50, and the District of Columbia), with no transportation for compensation on return except as otherwise authorized."
>
> RESTRICTION: The operations authorized herein may not be combined or joined with any other authority presently held by carrier for the purpose of providing through service.

The vendee proposes to tack vendor's authority with vendee's present authority at York, Pa., or points within 10 miles thereof.

No. MC-60014 (Sub-No. 38): By this application filed January 29, 1975 (which is directly related to the application filed in No. MC-F-12331), vendee Aero seeks to eliminate the gateway of York, Pa., and points within 10 miles thereof, created by the proposed joinder of the

rights to be acquired from Miller with the existing authority of Aero. As pertinent here, the vendee is authorized by certificate No. MC-60014 and various subs thereunder to operate as a motor common carrier, over irregular routes, in interstate and foreign commerce, in the transportation of size and weight commodities within the States of Connecticut, Delaware, Illinois, Indiana, Maine, Maryland, Massachusetts, Michigan, New Hampshire, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, Vermont, Virginia, West Virginia, Wisconsin and the District of Columbia. Thus, approval of the section 5 application and a grant of the related Aero Sub-No. 38 application, including removal of the York, Pa., and 10 miles thereof, gateway would authorize operations from the above 18 States and District of Columbia to points in the United States, except Alaska and Hawaii. The vendee seeks no duplicating authority by virtue of the applications and is willing to accept a condition eliminating any duplication which may result from a grant of the applications.

The proceedings were referred to the Administrative Law Judge for hearing and for the issuance of an initial decision. After due notice, hearings were held in Washington, D.C. from July 28 through August 1 and on August 6, 1975 at which Ace Doran Hauling & Rigging Co. (Ace Doran), C & H Transportation Co., Inc. (C & H), Daily Express, Inc. (Daily), Dallas & Mavis Forwarding Co. (Dallas & Mavis), Hennis Freight Lines, Inc. (Hennis), Home Transportation Company, Inc. (Home), International Transport, Inc. (International), H. J. Jeffries Truck Line, Inc. (Jeffries), Mercury Motor Express, Inc. (Mercury), Moss Trucking Company, Inc., (Moss), J. H. Rose Truck Line, Inc. (Rose), Vance Trucking Company (Vance), and Wales Transportation, Inc. (Wales) opposed the granting of the applications and introduced evidence in opposition. Briefs have been filed.

Background

Vendor has been engaged in various types of for-hire transportation in intrastate and interstate commerce for approximately 34 years. Its headquarters are maintained at York, Pa., and during the course of its operations it maintained terminals at York, Pa.; Brooklyn, N.Y.; Reno, Pa.; and a call station at Suffolk, Va. On January 1, 1974 vendor operated 55 tractors and 71 trailers in its general freight business and 24 tractors and 55 trailers in its heavy hauling business.

In 1972, vendor ran into severe financial problems and was losing money in its operations. In June of 1972, York, Pa. was hit by a severe flood resulting from a storm in Pennsylvania and other areas. This flood caused considerable damage to vendor's equipment and terminals and, from that time forward, vendor could not recover. Mr. Paul W. Hively, vendor's President and sole shareholder is in poor health, preventing him from spending the required time to the company. In 1972 vendor's operating loss was approximately $373,000 and in 1973 its operating loss was approximately $570,000, a total operating loss in excess of $800,000 for the two years. In addition to these factors, vendor encountered severe labor problems in June of 1973 and, collectively, these conditions brought about its decision to sell its operating rights.

After negotiations, vendor contracted to sell its operating authorities to five motor carriers, all of whom joined in applications under either section 5 or section 212(b) of the Act. These other sales are to A.A.A. Trucking Corp. (Docket MC-F-12105); LoBianco Trucking Company, Inc. (Docket MC-FC-74937); Mid-Penn Transportation, Inc. (Docket MC-FC-74948); and Transervice Corporation (Docket MC-F-12100).[2] With the exception of the Transervice Corporation application, all

[2] Included also is P-Y Transport (Docket MC-FC-74949).

other purchases have been the subject of hearings and initial decisions. The application of A.A.A. has been approved and consummated. The application of Transervice Corporation in MC-F-12100 was dismissed at the joint request of the parties thereto for the reason that Transervice Corporation was not in a position to go forward with the transaction. Thereafter, vendor entered into negotiations with vendee for the sale of the authority originally involved in the Transervice transaction, and the agreement of sale between vendor and vendee was executed on October 2, 1974. The authority which is the subject of the present section 5 application is the sole remaining interstate authority of the vendor.

In connection with the proposed sale to Transervice, the Commission granted temporary authority pursuant to section 210a(b) of the Act for Transervice to lease the operating rights involved, and temporary operations were instituted by Transervice on February 11, 1974. When Transervice was unable to proceed with the corresponding permanent authority application in Docket MC-F-12100, vendee and vendor filed an application under section 210a(b) of the Act for vendee to temporarily lease the involved authority, which application was approved by order of the Commission dated October 18, 1974 and vendee instituted its temporary operations on November 4, 1974. Accordingly, vendor has performed no operations in its own right under the involved operating authority since February of 1974, the operations being conducted under temporary lease initially by Transervice and subsequently by vendee.

Vendor is also in the process of disposing of all of its intrastate operating authorities. It presently has no equipment, and if this application is denied, vendor will immediately seek another purchaser for the authority involved. Vendor will continue in existence as a non-carrier corporation, until all payments are received from the various sales of the operating rights involved.

Terms of the Transaction

The terms of the proposed transaction are set forth in an agreement of sale entered into by and between vendee, vendor and vendor's president, Paul W. Hively, as an idividual, on October 2, 1974. Among other things, the agreement provides that the transaction covers only those interstate operating rights issued to vendor in certificate No. MC-41915 (Sub-No. 33), and that "the total purchase price for said certificate" shall be $200,000, of which $2,000 was paid to vendor as a down payment upon execution of the agreement. The agreement further provides that during vendee's temporary operation of vendor's sub 33 certificate, and before administratively final authority to consummate the transaction has been received, vendee shall pay vendor $3,000 for each month of temporary operations, the first payment to be made upon exercise of temporary authority. Upon approval and consummation of permanent acquisition of the certificate, $2,000 of each such monthly payment shall be applied to reduce the sum of $73,000 due upon consummation and closing of the section 5 transaction. The balance of said monthly payments are to be retained by vendor. In the event the section 5 transaction is not approved by the Commission, vendor will retain the full sum of the monthly rental payments. The balance of $125,000 of the $200,000 purchase price is to be paid in 120 monthly installments beginning January 2 of the year following consummation of the section 5 transaction, subject to interest of seven percent per annum on the declining monthly balance. Vendee's obligation to pay this deferred portion of the purchase price is to be evidenced by a promissory note, drawn in accordance with the laws of the State of Pennsylvania.

The agreement further provides that vendor and Mr. Paul W. Hively, vendor's president, will, for a period of five years from consummation, assist vendee in the preservation of vendee's interstate business pursuant to the au-

thority to be purchased and will not compete in any way with vendee or any successor or assignee of vendee in motor carrier operations in interstate commerce within the territory authorized to be served by said authority. As consideration for their assistance and agreements not to compete, vendee will pay vendor and Mr. Hively each the sum of $20,000 per year during the five year term of the agreement.

Prior Operations of Vendor

Under vendor's authority that is subject to this proceeding, the applicants presented a traffic study showing that for the period December 1972 through December 1973, the vendor handled 1,422 shipments (22,730,826 pounds). After eliminating shipments to areas not involved in the instant application, the record shows that the vendor handled some 759 pertinent shipments during the above-stated period. The destination States, the number of shipments to each State, and the total shipments are as follows:

State	Number of Shipments
Alabama	25
Arizona	12
Arkansas	23
California	25
Colorado	4
Florida	46
Georgia	39
Idaho	0
Illinois	55
Indiana	22
Iowa	1
Kansas	3
Kentucky	23
Louisiana	17
Maine	3
Massachusetts	70

Michigan	71
Minnesota	10
Mississippi	17
Missouri	34
Montana	0
Nebraska	5
Nevada	1
New Hampshire	2
New Mexico	1
North Carolina	21
North Dakota	0
Oklahoma	20
Oregon	0
Rhode Island	7
South Carolina	7
South Dakota	0
Tennessee	42
Texas	87
Utah	3
Vermont	1
Virginia	26
Washington	1
West Virginia	23
Wisconsin	8
Wyoming	0
District of Columbia	4
Total	759

While there were no shipments to a few of the western States, the study does, in fact, show a substantial volume of traffic to most of the States embraced in the section 5 application. The predominant commodity transported by the vendor was refrigeration machinery, but the traffic study also includes the transportation of such heavy hauling commodities as body valves, gondolas, expansion joints, machinery, jigs, boilers, plates, turbines, regulators, bowl liners, connecting belts, iron bodies, steel

machinery, gears, machinery parts, drill barge, and gate parts. The applicants also presented a traffic study covering the period February 21, 1974 through October 29, 1974, in which Transervice operated the Miller rights. This study, which was admitted into evidence over protestants' objection, showed some 398 shipments during the approximate eight-month period, consisting of various commodities such as air coolers, chain hoists, bar systems, pulley blocks, boilers and traveling cranes in addition to refrigeration machinery.

Vendee's Operations and Financial Status

The scope of the vendee's authority, embracing some 18 States and the District of Columbia, has been previously described herein. Vendee conducts operations with 541 tractors and 678 trailers consisting of flatbeds, lowboys, extendables, tri-axles, vans, level decks, and detachable gooseneck units. Twenty-five terminals are operated at various points in the States of Pennsylvania, Maryland, Massachusetts, New York, Ohio, Indiana, New Jersey, Connecticut, Illinois, Virginia, Delaware and Rhode Island. Vendee has in effect maintenance and safety programs designed to insure compliance with applicable Commission and Department of Transportation regulations and, upon the evidence presented in this record, the Administrative Law Judge concludes that vendee's operations are presently in compliance with the law and regulations.

Vendee's balance sheet as of May 31, 1975 shows total assets of $1,771,847 consisting of: current assets of $1,522,814, comprised of cash—$165,160, special deposits—$45,416, notes receivable—$177,217, accounts receivable—$852,527, vouchers advanced receivable—$135,855, prepayments—$47,322, materials and supplies—$4,224 and cash surrender value of life insurance—$95,092; total fixed assets less depreciation of $54,721, comprised of rigging equipment—$10,000, service vehicles—$25,728, office furniture and fixtures—$88,036 and accumulated depreciation—$69,073; intangible assets of $194,313, comprised of operating certificates—$176,313 and deposits—$18,000. Current liabilities were $951,352 and there were no long-term liabilities. The capital stock accounts were $1,000, paid-in surplus—$59,005, and earned surplus—$760,490.

Vendee's income statements for the years 1972, 1973 and the first five months of 1975 show, respectively, operating revenues of $13,105,544, $16,423,382 and $7,072,687, and net income, before provision for income taxes, of $160,126, $243,574 and $158,334, and after provision for income taxes of $75,534, $130,186, and $93,112, respectively.

If the proposed transaction had been consummated on May 31, 1975, vendee would pay the required $57,000 down payment ($73,000 less temporary authority payments of $18,000) from its cash account, leaving a total of $108,160 cash with which to continue operations. After such payment, vendee's total current assets of $1,465,814 would exceed its current liabilities of $1,003,852 by approximately 1.4:1. Vendee's total assets of $2,096,848 would exceed total debt (consisting of current and long-term obligations) of $1,276,352, and its debt-equity ratio of $1,276,352 to $820,495 equity is well within permissible limits. Accordingly, the Administrative Law Judge concludes that vendee has sufficient financial strength to meet the financial requirements of the transaction without affecting its ability to continue operations as a viable motor carrier.

The record establishes that revenues earned by vendee pursuant to operations under the temporary authority during the first five months of 1975 were $652,710. After deducting expenses of $574,134, vendee's net income from temporary operations was $78,576. Then, deducting from this amount the money owed to the vendor and to Mr. Hively for their respective agreements not to compete and federal income taxes of $28,116, the vendee had a net income of $30,460. Annualized this net figure would be about

$73,000 and means that vendee can recoup the entire $400,000 investment in operating rights and noncompetitive covenants in 5.47 years, earning an after-tax return on investment of 18.27 percent. Accordingly, the Administrative Law Judge concludes that the total financial aspects of this transactions are favorable and not contrary to the public interest. Vendee will issue a promissory note in the amount of $125,000 covering the deferred portion of the total purchase price; however, this note when added to vendee's existing securities will not cause the total securities to exceed $1 million and, accordingly, an application under section 214 of the Act is not required.

Vendee submitted a traffic study showing operations conducted by vendee pursuant to its temporary lease of vendor's authority. This traffic study lists 424 shipments weighing 3,659,366 pounds transported during the period November 4, 1974 through July 3, 1975 in so-called "direct" operations from York, Pa., or points within 10 miles thereof to points in the involved destination territory. The exhibit also lists 587 shipments weighing 22,170,317 pounds handled during the period November 25, 1974 through June 30, 1975 moving in so-called "overhead" operations from a point in vendee's present service area to a point in the destination territory of the certification which is the subject of this transaction. While some of this traffic did not move under the Miller rights, the volume thereof is not substantial enough to significantly alter the vendee's revenue data during temporary operations, as hereinbefore discussed. Most of the foregoing traffic was handled via the gateway of York, Pa., or points within 10 miles thereof. In order to assure that the vehicles observe the York gateway, all drivers had to report to vendee's York, Pa. terminal and execute a "sign-in" sheet which is maintained by vendee's terminal manager. Further, all documents relating to qualification with the various State requirements were picked up at the York, Pa. terminal.

Although the authority to be purchased is one-way in scope, the vendee has been able to conduct balanced operations under the temporary authority by either originating return traffic under other grants of authority held by vendee or trip-leasing its vehicles to other carriers for a return movement. Vendee has had trip-lease operations with 60 carriers during the first seven months of 1975. Vendee's vehicles also transport exempt commodities on some return movements. Vendee believes that operations under the authority to be purchased can be conducted economically and without substantial deadhead mileage and a review of its income statement for the first five months of 1975 supports this belief since operations were conducted at an after-tax profit. Since vendee was conducting the temporary operation throughout 1975 it believes its income statement establishes the economic feasibility of the consolidated operations.

Vendee's Prior Interlining Operations

Vendee has participated in interchange operations with other carriers for many years. A traffic study for the period January 2, 1969 through July 16, 1975 lists 2,242 such interline shipments weighing 76,159,413 pounds. This study lists only those shipments moving from a point in vendee's present 19 state service area to a point in the destination territory of vendor' certificate which is the subject of this transaction. All of this traffic was handled pursuant to either the Heavy Haulers Red Book Plan of Interchange or pursuant to separate tariff concurrences between vendee and other carriers. Some of the traffic moved on the vehicles of vendee and some of the traffic moved on the vehicles of the connecting carriers. None of this traffic was interchanged with vendor, but vendee contends that this traffic study establishes its competitive participation in the movement of traffic moving from points in its present service area to points in the destination territory covered by vendor's certificate which is the subject of this transaction.

Shipper Evidence

Nine representatives of the shipping public supported the applications. Following is a summary of their evidence.

Bethlehem Steel Corporation: This corporation manufactures a variety of steel products and operates 11 steel plants throughout the United States. It produces such steel products as wire, bars, pipe, plates, sheets, rails, rods, angles, channels, and coils and supports this application for the shipment of these steel products from Bethlehem and Johnstown, Pa. to points in the States of Alabama, Florida, Georgia, North Carolina, and South Carolina. These shipments move in truckload quantities having an average weight of approximately 20 tons, and flatbed equipment, both conventional and the extendable type, open tops and van trailers are the desired types of equipment for these shipments. It ships approximately 400 truckloads annually from the two Pennsylvania origin points to the five southern States. It has been using the services of Aero in the transportation of iron and steel articles for some time and has found Aero to be a reliable size and weight carrier. In the past, shipper has also used nonprotestants David Graham, Cooper Motor Lines, Virginia Hauling, Superior Trucking, George Transfer & Rigging, Eagle Motor, Mason & Dixon, Ryder Truck Lines, R. C. Motor Lines, Jones Motor, Branch Motor Express, and Johnson Motor Lines and protestant Mercury Motor Express to move this traffic. The majority of the carriers serving the Bethlehem and Johnstown mills are domiciled in the south. Shipper has found that equipment is often not available for southbound shipments and that extendable flatbed trailers are in short supply, particularly going from the north to the south. In addition, many of the carriers presently serving this company have fragmented authority and can only serve certain points within a given State. Aero has terminals close to the shipper's mills, and has equipment available on a day-to-basis. Shipper is not using any of the other protestants on this traffic.

Universal Cyclops Specialty Steel Division: This company produces and ships strip steel, bar wire and billets, sheet steel, precision shapes and forgings. Strip steel is produced at Coshocton, Ohio; bar wire and billets are produced at Bridgeville, Pa.; sheet steel and strip are produced at Pittsburgh, Pa.; and bar, billets, precision shapes, and forgings are produced at Titusville, Pa. It has used Aero's services in the past and has found Aero to be a reliable and responsible motor carrier. The shipper's traffic moves in both truckload and less-than-truckload quantities, the average weight of a truckload being 40,000 pounds and LTL shipments running anywhere from 1,000 to 24,000 pounds. Flatbed trailers and open top equipment are required for the over-the-road transportation of these products. The total tonnage of products shipped during the year 1974 are: Bridgeville and Pittsburgh, Pa.—38,928,000 pounds and Coshocton, Ohio—70,102,000 pounds. The tonnage of products shipped for the first six months of 1975 are: Bridgeville and Pittsburgh, Pa.—10,030,000 pounds; Titusville, Pa.—10,681,000 pounds; and Coshocton, Ohio—22,053,000 pounds. In the past, shipper has relied upon nonprotestant Ryder to transport truckload quantities from Pittsburgh to Louisiana. In addition, shipper has relied upon Ace Doran Hauling & Rigging Co., principally for traffic out of the Coshocton, Ohio plant and it has used C & H Transportation twice recently out of the Titusville, Pa. plant; and Daily Express one time over a year ago. Shipper is supporting this application for movements to the States of Louisiana, Florida, North Carolina, South Carolina and Georgia. It has had difficulties finding reliable service to those areas, particularly Louisiana. It is not using any of the other protestants for this traffic.

Jones & Laughlin Steel Corporation: This company manufactures a full line of iron and steel articles including wire, rods, pipe, seamless tubes, strips, bars, billets, railroad spikes, industrial steel products, and galvanized sheet

and coils. It supports this application for the movement of these iron and steel products from its plants in Pittsburgh and Aliquippa, Pa. to points in the States of North Carolina, South Carolina, Florida and Georgia. During the period of January to June, 1974, it shipped from its Pittsburgh and Aliquippa plants the following quantities: to North Carolina—531 truckloads for a total of 11,116 tons; to South Carolina—67 truckloads for a total of 1,435 tons; and to Florida—56 truckloads for a total of 1,181 tons. Shipper has been using the services of Aero as a steel hauler out of the Aliquippa and Pittsburgh plants for 18 years and considers Aero to be a reliable carrier which provides good service. Shipper has used the services of protestant Daily Express a few times into the State of Kentucky and, perhaps, a few other places. It previously used Dallas & Mavis, but in May, 1974 that carrier ceased solicitation of shipper's business. In addition, shipper has used Mercury Motor Express into Georgia and Florida, but has found it to be short of equipment at times. Shipper also uses Hennis Freight Lines and Vance Trucking into the States of North Carolina and South Carolina with Hennis providing occasional service into Georgia. Shipper has also used non-protestant Ryder into the State of Florida, L & B Express into Kentucky and Tennessee, Spector into the south, and Jones Motor into North Carolina. Shipper is not using any of the other protestants for traffic moving into these southeastern States.

Grove Manufacturing Company: This company is the largest manufacturer of hydraulic cranes in the world. Insofar as this application is concerned, it produces and ships these hydraulic cranes from its plant in Shady Grove, Pa. to points throughout the United States. These cranes are self-propelled units and must be moved almost exclusively upon removable gooseneck trailer equipment. Shipper and its domestic competitors ship as many as 205 cranes on any given day, all requiring removable gooseneck lowboy trailers for movement. A telephone survey of 18 carriers (including all protestants) disclosed that these carriers collectively operate only 138 removable gooseneck trailers in this area, operating out of terminals ranging up to 800 miles away from shipper's plant. Shipper produces and ships from Shady Grove approximately 2,000 to 2,100 cranes per year. Shipper maintains a private trucking fleet, including five removable gooseneck lowboy trailers, and was forced to haul 564 cranes during the year 1974 because it was unable to obtain the proper equipment from the common carrier fleets.

Elwin J. Smith Division of Cyclops Corporation: This corporation produces iron and steel roof deck and floor deck at its plant in Heidelberg, Pa. Shipper supports the applications to have Aero's services available for shipments from Heidelberg to the States of North Carolina, South Carolina, Georgia and Florida. During the year 1974, it shipped approximately 76,000 tons from this plant, with an average weight per truckload of 40,000 pounds. During the year 1974, the shipping volume to the four States for which shipper is particularly interested in having Aero's services available were: 420,000 pounds to Florida; 730,000 pounds to Georgia; 650,000 pounds to South Carolina; and 725,000 pounds to North Carolina. Shipper has been using the services of Aero for some time, has found Aero to be a reliable and responsible size and weight carrier, and indicates that "they are probably our No. 1 carrier in service and volume." In the past, shipper has used protestants Ace Doran, principally into Illinois and Indiana, Daily Express and Vance Trucking. This company ships about 90 percent by truck and about 10 percent piggyback. About 95 to 100 percent of all material is shipped to jobsites and must be unloaded by cranes onto the roofs of buildings. Because of the high price of cranes and the operating crews of cranes, all jobsite deliveries must be scheduled. Shipper states that Aero has always been without a doubt the most dependable carrier it has, because of scheduled deliveries and the importance of delivery on its overall performance. Shipper is not using any of the other protestants on this traffic.

Wheeling-Pittsburgh Steel Corporation: This corporation manfactures a variety of steel products at several manufacturing plants in Pennsylvania, Ohio and West Virginia. The Wheeling-LaBelle plant produces nails; Beech Bottom produces culvert pipe and roof deck; Martins Ferry produces sheet steel in coils, wire and roofing; Yorkville produces tinplate in coils and cut lengths and cold rolled steel in cut lengths and coils; Benwood produces pipe, conduit and couplings; Steubenville and Follansbee both produce sheet steel in cut lengths and coils; Wheeling produces framing; Monessen produces billets and slabs; and Allenport produces sheet steel in both cut lengths and coils, tubing, and oil country pipe. It ships these products to almost every State in the union. Shipper estimates 65 percent of all its tonnage produced moves by truck, 20 percent moves by rail, and 15 percent by barge. The average weight of a truckload is 42,000 to 44,000 pounds and the vast majority of the shipments require flatbed equipment. Wheeling-Pittsburgh shipped the following tonnage from its plants in Pennsylvania, Ohio and West Virginia during the year 1974:

State	Tons	State	Tons
Alabama	12,000	Missouri	63,000
Arkansas	9,600	New Jersey	81,000
California	13,000	New Mexico	318
Connecticut	9,500	New York	102,000
Florida	5,700	North Carolina	12,816
Georgia	12,500	Ohio	446,000
Illinois	142,000	Oklahoma	6,300
Indiana	148,000	Oregon	4,500
Iowa	950	Pennsylvania	358,000
Kansas	1,900	Rhode Island	1,200
Kentucky	43,716	Tennessee	74,000
Louisiana	29,000	Texas	130,200
Maryland	7,100	Virginia	2,200
Massachusetts	12,000	Washington	2,800
Michigan	308,000	West Virginia	203,000
Minnesota	11,000	Wisconsin	22,000
Mississippi	90		

PAGINATION IS INCORRECT,

BUT TEXT IS COMPLETE.

ships a wide range of iron and steel products, bars, forgings, plates, rods, semifinished, sheet and strip, structurals, tinplate, tubular products and wire products from Joliet, South Chicago and Waukegan, Ill.; Gary, Ind.; Trenton, N.J.; Cleveland, Lorain and Youngstown, Ohio; and Clairton, Dravosburg, Duquesne, Elwood City, Fairless Hills, Homestead, McKeesport, and Vandergrift, Pa. From April 1, 1974 to March 31, 1975, U.S. Steel shipped approximately 3,202,700 tons of such products from these origins to points in the 39 destination States involved in this application (except Alaska and, except that no traffic moved from the Illinois, Indiana, Pennsylvania or New Jersey origins to points in Nevada). U.S. Steel anticipates that its level of steel shipments from these origin points will probably exceed these volumes in the future. For competitive reasons, U.S. Steel is not able to provide a detailed breakdown of its shipment figures: however, it was able to submit a list of representative points in the destination territory to which shipments were made in the past to such customers as manufacturers, contractors, hardware outlets, warehouses and construction companies. To serve these customers, U.S. Steel must have dependable motor carrier service as rail service is not sufficient to meet its needs. U.S. Steel Corporation has used the services of vendee for the transportation of iron and steel articles for 24 years and considers Aero to be qualified by experience, willingness and ability to handle this traffic.

Seven of the above-named shippers (Bethlehem Steel Corporation, Universal Cyclops Specialty Steel Division, Jones & Laughlin Steel Corporation, Elwin J. Smith Division of Cyclops Corporation, Wheeling-Pittsburgh Steel Corporation, Colt Industries Division of Crucible, Inc., and United States Steel Corporation) are producers of various types of iron and steel articles, one shipper (Grove Manufacturing Company) produces hydraulic cranes, and one shipper (Gibson Motor & Machine Service, Inc.) produces fire fighting apparatus for airport use. Although the ter-

ritorial scope of shipper support varies among the companies involved, five support the application for the movement of commodities to points in the southeastern States of North Carolina, South Carolina, Georgia and Florida; two of these five also support the application to the southern States of Alabama and Louisiana, and the remaining four shippers support the application to points throughout the continental United States.

These shippers have all used the services of vendee under its present authorities and have also used vendee's services under the temporary authority. They find vendee to be a reliable and responsible motor carrier operating the proper type of equipment and capable of performing a service to meet their individual needs. They support the application for a continuation of Aero's services under the temporary authority, as well as for removal of the York, Pa. gateway to enable direct service. All of these shippers utilize a multiple-carrier system to meet their total transportation requirements. Protestants' services have been used to some extent as have the services of many other carriers who operate in the involved territory. These shippers uniformly express difficulty in obtaining equipment at the time desired and therefore believe that the services of vendee resulting from approval and consummation of this transaction are necessary. Shippers also uniformly state that approval of the application will not materially change their utilization of vendee's services by diverting traffic from other carriers. Since shippers presently utilize a multiple-carrier distribution system to meet their total transportation requirements, no one carrier will ever be in a position to meet the individual needs of any shipper. Shippers support the application to obtain an improvement in the services of vendee, a carrier presently serving these shippers.

Protestants' Evidence

Moss: As pertinent to these proceedings, Moss is authorized to transport heavy hauling commodities as well

as other specified commodities from, to or between points in Connecticut, Delaware, Maryland, Massachusetts, New Jersey, New York, that portion of Pennsylvania east of the Susquehanna River, Rhode Island, and the District of Columbia on the one hand, and, on the other, Florida, Georgia, North Carolina, South Carolina and Virginia. Terminal facilities are maintained in the States of Delaware, Georgia, North Carolina, South Carolina and Virginia. It operates 172 tractors, 312 trailers (consisting of flatbeds, drop decks, extendables, converta-vans, lowboys and pole trailers) and 47 units of miscellaneous equipment. Traffic studies were submitted showing service for Grove Manufacturing Company and Bethlehem Steel Corporation as well as other companies who are not supporting the application. Moss was unable to provide information concerning the total service it provides from and to points involved in the application. Moss holds several grants of authorities authorizing a one-way service and considers its operations pursuant to such authorities to be profitable. Moss acquired its Sub 28 authority in the Middle Atlantic and New England States by purchase and joins this authority with its other authorities for the rendition of through service. Revenues for the year 1974 were $7,780,000 representing the highest revenues in the history of the company's operations. In addition to single-line service, Moss operates a joint-line service under the "Red Book" interchange plan. It is desirious of handling additional traffic, since all of its equipment is not fully used.

Dallas & Mavis: This carrier holds heavy hauling authority to provide service from, to or between points in the States of Michigan, Illinois, Indiana, Ohio, Wisconsin, Connecticut, Iowa, Missouri, New York, Pennsylvania, New Jersey, Massachusetts, Rhode Island, Maine, New Hampshire, and Vermont. It also holds other grants of specific commodity authority authorizing service in these States as

well as other territory. It maintains terminals in the States of Michigan, Illinois, Ohio, Connecticut, Indiana, New York and Pennsylvania. Operations are conducted with 334 tractors and 482 trailers consisting of flatbeds, lowboys, extendables, drop decks, detachables, tankers, and vans. The company has purchased authorities in recent years to extend its service area into States served by vendee and, further, tacks the newly acquired authorities with existing authorities for the rendition of through service. A traffic exhibit was submitted comparing the traffic handled during the month of June, 1974 (consisting of 258 shipments generating revenues of $224,746) with that moving during the month of June, 1975 (consisting of 226 shipments generating revenues of $187,507). Protestant is not in a position to identify any specific traffic that it has lost to vendee by virtue of vendee's temporary authority operations. Gross revenues for the year 1974 were $31,588,000 and were the highest revenues in the history of the carrier's operations. Gross revenues for the first quarter of 1975 exceeded those for the corresponding quarter in 1974.

C & H: C & H is the nation's largest heavy hauler holding authority to perform heavy hauling services throughout the continental United States. It maintains terminals at various points in the States of Alabama, Arizona, Arkansas, California, Colorado, Florida, Georgia, Illinois, Kansas, Louisiana, Massachusetts, Michigan, New Jersey, New York, Ohio, Oklahoma, Oregon, South Carolina, Texas, Utah, Washington and Wyoming. Operations are conducted with a total of 1,486 tractors and 2,470 trailers consisting of flatbeds, drop frames, lowboys, vans, open tops, pole trailers and other types of specialized equipment. During the first six months of 1975, C & H transported 61,253,711 pounds of traffic for revenues of $2,448,240.95 within the territory involved in this proceeding. Gross revenues from all sources for the year 1974 were $73,746,000 representing the highest revenue year in the history of the company's operations. C & H presently is prosecuting an application

under section 207 of the Act seeking, in part, to perform heavy hauling services from points in the States of Michigan, Indiana, Ohio, Kentucky, West Virginia and Pennsylvania to points in the United States by tacking of the authority sought with C & H's present authority. C & H is also prosecuting an application under section 5 of the Act to perform heavy hauling services between points in Maine, on the one hand, and, on the other, the rest of the United States.

Ace Doran: Ace Doran is a heavy hauler conducting operations from, to and between points in the States of Wisconsin, Illinois, Indiana, Michigan, Ohio, Kentucky, New York, New Jersey, Pennsylvania, Maryland, Virginia and the District of Columbia. In addition, it holds numerous grants of specific commodity authority to conduct operations throughout the United States, many grants being "one-way" in nature. It maintains terminals at various points in the States of Illinois, Indiana, Kentucky, Maryland, Michigan, Missouri, New Jersey, New York, Ohio, Pennsylvania, Virginia, West Virginia, and Wisconsin. Operations are conducted with 756 tractors and 833 trailers consisting of flatbeds, extendables, lowboys, air-rides, poles, vans, and other types of specialized equipment. During the month of June, 1974 Ace Doran transported 2,945 shipments from 210 origins in the States of Delaware, Illinois, Indiana, Maryland, Michigan, New Jersey, New York, Ohio, Pennsylvania, and Virginia to 827 destinations in the States involved in vendor's certificate for a total weight of 114,874,971 pounds and total revenues of $1,336,387.59. Similar statistics for the month of June, 1975 showed 2,345 shipments from 217 origins to 751 destinations having a total weight of 116,854,872 pounds and revenues of $958,845.57. Total revenues for the year 1974 were $29,072,000 being the highest in the history of the company. Ace Doran participates in the Red Book Plan of Interchange and acknowledges that generally the level of rates published thereunder is higher than its own single-line rates. Ace Doran acknowledges that

Aero presently holds heavy hauling authority generally in the same area of the northeast and midwest that Ace Doran serves. Ace Doran presently has applications filed with the Commission for the purchase of heavy hauling authority into the New England States, Texas, California, Utah and Nevada. If Ace Doran is successful in these acquisitions it proposes to join the authorities purchased with its present authority for the rendition of through service in much the same fashion that vendee seeks to do in this proceeding.

Daily Express: Daily holds heavy hauling authority between points in New England, on the one hand, and points in the Middle Atlantic States, New York, New Jersey, Delaware, Maryland, Pennsylvania, Virginia, West Virginia and Ohio area on the other; and between points in this latter area on the one hand, and, on the other, Minnesota, Illinois, Indiana, Kentucky, Michigan and Wisconsin. It also operates between the Middle Atlantic States on the one hand, and, on the other, North Carolina, South Carolina, Georgia and Florida; and between the New England States on the one hand, and, on the other, North Carolina, South Carolina, Georgia and Florida. In addition, it holds numerous grants of specified commodity authority within the territorial scope of these proceedings. Operations are conducted with 573 tractors and 1,009 trailers consisting of flatbed, extendable, open top, van, detachable gooseneck, detachable lowboys, and other types of specialized equipment. It maintains terminals at various points in the States of Pennsylvania, Virginia, Georgia, Maryland, Alabama, New York, Iowa, Illinois, North Carolina, Ohio, South Carolina, Massachusetts, New Hampshire, Missouri, Wisconsin, Indiana, Kentucky, Mississippi, Minnesota, New Jersey, and Vermont. During the period December 1974 through July 1975, Daily transported 3,460 "size and weight" shipments moving from points in vendee's present service area to points in vendor's service area weighing 110,616,153 pounds and generating revenues of $3,107,322.67. Daily acknowledges that all of this traffic was handled during the

period of time that vendee was temporarily operating vendor's authorities. Daily's total revenues from all sources for the year 1974 were $24 million and this was the highest for any of the last five years. Daily has performed services for many of the shippers supporting this application and regularly solicits many of these shippers.

Hennis: As pertinent, Hennis holds general commodity authority to provide service from all points in Rhode Island, Connecticut, Massachusetts, Ohio, and Indiana, and portions of Maryland, Michigan, Pennsylvania (including Pittsburgh and 40 miles thereof, and Philadelphia and 25 miles thereof), New Jersey, New York, Wisconsin, Illinois and Kentucky, to all points in Virginia, North Carolina, South Carolina and Georgia. Hennis operates 207 tractors and 230 flatbeds in its Special Commodity Division; and 914 tractors, 1,356 vans, and 150 open tops in its General Commodity Division. The Special Commodity Division is designed to handle iron and steel traffic; also Hennis handles iron and steel in its General Commodity Division to the extent that such commodities are susceptible to being handled in vans or open tops. Hennis maintains 18 terminals in its Special Commodity Division, and 58 terminals in its General Commodity Division, including numerous locations within the pertinent territorial area. Hennis regularly solicits additional traffic, including solicitation of the iron and steel traffic of various of the shippers appearing in support here. On an annualized basis, Hennis is handling iron and steel traffic within the pertinent area in excess of 100,000,000 pounds, deriving a revenue of between $1,500,000 and $2,000,000 in its Special Commodity Division alone. It handles additional iron and steel traffic in its General Commodity Division. Hennis is actively seeking more traffic because so much of its equipment is idle. Prior to Aero's temporary authority operation, Hennis had not previously experienced competition from Aero on iron and steel traffic. Now, Hennis asserts that a considerable portion of its

traffic has been diverted to Aero. Hennis urges that if any portion of this application is granted, a restriction be imposed to protect it from diversion. The interest of Hennis in this proceeding relates to those commodities which might move under the so-called "twilight zone" of overlap between heavy haulers such as vendee and general commodity carriers such as Hennis. Hennis is presently in the process of being acquired by Spector Freight System who has temporary control of Hennis and, pursuant to such temporary control, operations are conducted between the Spector service area and the Hennis service area in much the same fashion that vendee is conducting its temporary operation of vendor. Hennis recognizes that it presently competes with at least 10 carriers for the movement of iron and steel articles to the Carolinas and Georgia, most of whom are not opposing these applications.

Vance: This carrier is authorized to provide service on iron and steel articles, as well as a number of other commodities, from various pertinent areas in Pennsylvania, Maryland, Virginia, Delaware and New Jersey, to all or portions of North Carolina, South Carolina, Georgia and Florida. In particular, it holds authority to originate iron and steel traffic in the Pittsburgh and Philadelphia areas of Pennsylvania. Vance operates 140 tractors and 146 flatbeds. Its flatbeds are equipped for transportation of iron and steel articles. The Vance equipment is not fully utilized, and it has not been since the beginning of the Aero temporary authority operation. Vance holds northbound authority which results in unloading of its equipment in the northeastern origin area here considered. Vance asserts that it has never had any difficulty providing sufficient equipment to satisfy the needs of shippers in the involved area. Vance provides stopoff service, scheduled pickup and delivery, jobsite delivery, notice as to estimated time of arrival, and so forth. Vance asserts that it has lost a large amount of traffic, especially the traffic of J & L Steel, as a result of Aero's temporary operations. In 1973 Vance hauled 1,073

loads for J & L, weighing almost 43,000,000 pounds. On an annualized basis in 1975 J & L will have tendered Vance a total of only 262 loads, for a volume of approximately 10,500,000 pounds. Also, Vance provide considerable service for others of the supporting shippers such as Elwin G. Smith, Division of Cyclops, for whom a traffic study was presented reflecting 276 loads, for a volume of approximately 10,250,000 pounds. Vance has had recent contact with shippers it serves, including J & L Steel and Elwin G. Smith, Division of Cyclops, and says there was no complaint with regard to the quality of service rendered by it. Other studies were presented by Vance reflecting the decrease in volume of traffic being tendered it from the Pittsburgh and Philadelphia areas moving within the scope of this application. In 1973 and 1974 Vance handled approximately 1,500 loads per year from the Pittsburgh area for a volume of between 55,000,000 and 60,000,000—whereas for the first six months of 1975, it was tendered 418 loads weighing approximately 16,000,000 pounds. The Vance witness said grant of temporary authority to Aero as a result of this proceeding has had a more severe effect on his company than any other action ever taken by this Commission. Vance opposes the application because of alleged diversion of traffic to vendee, asserting that vendee's rates are lower than Vance's. For the year 1974, Vance's gross revenues were $4,162,000, the highest ever produced by Vance. Thus, there is no real evidence of revenue loss by Vance and no evidence whatsoever that Vance's traffic loss was the direct result of Aero's temporary operations. As to rates, Vance has not at any time protested vendee's rate level as being noncompensatory.

International: This carrier, one of the nation's largest heavy haulers, holds authority to transport size and weight commodities from numerous northeast States to a number of midwest and western States. The northeast States served are Connecticut, Massachusetts, Rhode Island, Delaware, New Jersey, Illinois, Indiana, Maryland, District of Colum-

bia, Michigan, New York, Ohio, Pennsylvania, Virginia, West Virginia and Wisconsin. It can serve all or portions of the following States: Wisconsin, Illinois, Minnesota, Iowa, Missouri, North Dakota, South Dakota, Nebraska, Kansas, Montana, Wyoming, Colorado, Idaho, Utah, Washington, Oregon, Nevada and California. It operates terminals scattered across the United States. It operates 1,421 trailers of various types, and approximately 176 tractors. In one month, April, 1975, International transported 390 shipments weighing 11,057,248 pounds deriving $596,921 in revenue on traffic moving from points in Indiana, Illinois, Michigan, Ohio and Wisconsin to points in the involved western States. In the same month from points in Maryland, Delaware, Pennsylvania, New Jersey, New York, Virginia, West Virginia, and the District of Columbia to points in the involved States International Transport hauled 194 size and weight shipments weighing 5,351,510 pounds and deriving $577,649 in revenue therefrom. In the same month, from Connecticut, Rhode Island and New Hampshire to points in the involved States International transported 26 size and weight shipments weighing 723,974 pounds and deriving revenue therefrom of $54,965. International contends that it has substantial traffic subject to diversion if this application is granted. For the year 1975, International's gross revenues from all sources were $55,036,000, the highest in its history.

H. J. Jeffries: Jeffries holds heavy hauling authority from, to and between points in the States of Arkansas, Kansas, Missouri, New Mexico, Oklahoma, Texas, Illnois, Indiana, Colorado, Louisiana, Wyoming, Montana, Nebraska, North Dakota, South Dakota, Utah, Michigan, Minnesota, Wisconsin and Ohio. Jeffries maintains sales representatives throughout its territory and has WATS facilities to coordinate interterminal communication. as well as multi-state pickups and deliveries. In the regular course of business, Jeffries provides jobsite, split and timed deliveries; a twenty-four (24) hour per day, seven (7) day

per week service; the spotting of equipment upon request; and specialized trailer equipment such as pole trailers and removable gooseneck lowboy equipment. It conducts its operations with some 248 tractors and 290 trailers. It maintains terminals at various points in the States of Colorado, Illinois, Ohio, Oklahoma, and Texas. Jeffries holds several grants of "one-way" authority and considers operations pursuant to such authority to be profitable. During the period April through June, 1975 Jeffries transported 691 shipments weighing 22,154,097 pounds for revenues of $531,175.27 moving from points in Ohio, Illinois, Indiana and Wisconsin. Jeffries opposes only the gateway elimination aspect of the transaction and if Aero were required to continue to observe the York, Pa. gateway Jeffries' interest would be satisfied. Gross revenues from all operations for the year 1974 were $12,171,000 representing the highest revenue in the history of the company's operations. Jeffries contends that the traffic referred to above would be subject to diversion and that any diversion of such traffic would be detrimental to the service Jeffries now renders and to the public.

Wales: This carrier is an irregular route carrier of "Mercer", earth drilling, contractors' machinery and equipment and "size and weight" commodities from, to and between points in a broad geographical area. As pertinent to this proceeding, its opposition is directed to the movement of these commodities from points in Indiana, Pennsylvania and Ohio to points that are generally west of the Mississippi River. In the regular course of Wales' service, it operates twenty-four (24) hours per day, seven (7) days per week, featuring jobsite, split and timed deliveries; flatbed and specialized trailer equipment upon request; and the services normally provided by a specialized, irregular route motor common carrier. It conducts operations with 302 tractors and 421 trailers, and maintains terminals at various points in the States of Texas, Pennsylvania, Oklahoma, Missouri, and Illinois. During the month of Novem-

ber, 1974 Wales transported 12,212,066 pounds of "size and weight" traffic moving from points in Indiana, Pennsylvania, Ohio and Illinois to points which are generally west of the Mississippi River generating revenues of $192,775.01. Wales believes that it competes with approximately a dozen motor carriers for this type of traffic, and therefore it does not want an additional competitor in this highly competitive area. Wales has served some of the supporting shippers for many years, has had no complaints from these shippers, and asserts that it needs additional traffic.

Home: Home is a heavy hauler conducting operations from, to and between points in Connecticut, Delaware, Illinois, Indiana, Kentucky, Maine, Maryland, Massachusetts, Michigan, New Hampshire, New Jersey, Ohio, Pennsylvania, Rhode Island, Virginia, West Virginia, Wisconsin and the District of Columbia to points in Alabama, Tennessee, Arizona, Utah, Arkansas, Colorado, New Mexico, Texas, Georgia, North Carolina, South Carolina, Florida, Kansas, Oklahoma, Nebraska, Wyoming, Louisiana, Mississippi, and Iowa. It maintains terminals at various points in the States of Georgia, Illinois, South Carolina, Alabama, Texas, North Carolina, Tennessee, Kansas, California and Ohio, and is establishing a new terminal in the Philadelphia, Pa. commercial area. Home assigns trailers at or near shipper's facilities when the traffic volumes justifies it, and maintains such pool locations at such points as Danville and Aurora, Ill.; Mansfield, Ohio; Zelienople, Pa.; Pittsfield, Mass.; Ellenville, N.Y.; Erie, Pa.; Lorain, Ohio; La Crosse, Wis.; and Moline, Ill. Home operates a fleet consisting of approximately 349 tractors, 508 flatbed trailers, 105 of which are drop deck trailers and another 28 of which are expandable flatbeds; 38 van trailers; 66 lowboy trailers, 49 of which are of the removable gooseneck variety; and various other trailers of a highly specialized nature such as expandable lowboys, beam trailers, and pole trailers.

Protestant Home produced evidence of the number and type of shipments handled from January 1, 1975 through June 30, 1975, which might be subject to diversion if the applications are granted. Presented as traffic subject to possible diversion were 2,808 shipments, comprising a total weight of 79,787,404 pounds, producing a gross revenue to protestant of $2,813,063.33. Home recognizes that throughout this period of time vendee was conducting its temporary operations of vendor's certificate. Total revenues from all sources for the year 1974 were $18,617,000 representing the highest revenues in the history of the company. Home has several grants of "one-way" authorities and considers its operations thereunder to be economical. Home has processed several purchase applications and joins the authority acquired with existing authority for "overhead" operations in much the same fashion that vendee seeks to do in this proceeding.

Mercury Motor Express: Mercury is a motor common carrier of general commodities, with the usual exceptions (including the exception of "commodities requiring special equipment"). As pertinent, Mercury is authorized to operate between all points in the States of Florida, Georgia and South Carolina, on the one hand, and, on the other, points in Virginia, West Virginia, Pennsylvania, Maryland, Delaware, New Jersey, Rhode Island, Connecticut, Massachusetts, the District of Columbia, and those points in New York on and south of New York Highway 7. Mercury maintains terminals, as pertinent here, at Hartford and New Haven, Conn.; Delmar, Del.; Washington, D.C.; Baltimore, Md.; Boston, Mass.; Newark, N.J.; Woodside, N.Y.; Erie, Harrisburg, Kutztown, Philadelphia, Pittsburgh, Scranton, Williamsport and Carnegie, Pa.; Chesapeake, Va.; Cranston, R.I.; and Morgantown, W. Va. In its Line-Haul Division, Mercury operates approximately 186 over-the-road tractors, and 565 trailers, consisting primarily of van trailers and open top trailers. In addition, in its Quicksilver Division, Mercury operates 64 tractors and 101

trailers, consisting of 51 flatbed trailers and 50 van trailers. Mercury presented a traffic study showing traffic handled by its Quicksilver Division in the month of January, 1975, which, it stated, would be subject to diversion if the applications are granted. This one-month traffic study shows that Mercury handled various types of commodities such as steel plates, cable, coil steel, pressure pipe, steel forging and angles and other iron and steel articles, representing 132 shipments comprising a total weight of 4,791,420 pounds and producing revenue of $93,532.70. Mercury's interest in the Sub-No. 38 application relates to those commodities transported in the so-called "twilight zone," which is the area of overlap common to both heavy haulers and general commodity carriers and consists of those articles requiring mechanical equipment for loading or unloading, where such is supplied by the consignor and consignee, but do not require specialized trailer equipment for over-the-road transportation. Mercury also submitted a one-week traffic study showing traffic handled within the scope of Aero Sub-No. 38 application, that moved in the service of its General Commodities Division. In 1974, throughout its entire system, Mercury earned gross revenues of $31 million, being the highest in any of the years 1970 through 1974.

J. H. Rose Truck Line, Inc.: Rose opposes only the gateway elimination proceeding as regards the movement of traffic from Pennsylvania, Indiana, and Illinois to points which are generally west of the Mississippi River. It holds authority to transport so-called "Mercer" and earth drilling commodities in this area. It also holds heavy hauling authority from points in Illinois and Indiana to points in Arkansas, Indiana, Kansas, Kentucky, Louisiana, Missouri, New Mexico, Oklahoma, Tennessee, Texas, Illinois, Arizona, California, Oregon, Washington, Utah and Nevada. Further, it holds authority to transport certain specified commodities from Indiana and Illinois points. Rose operates a total of 1,132 pieces of equipment including 335 over-the-road tractors and a total of 615 trailers. Its fleet of trailer

equipment includes 350 flatbed trailers, and approximately 130 lowbed trailers of various types and kinds. Rose operates a total of 20 permanent terminal facilities within the area of its operations, and, as pertinent, Rose maintains a terminal facility at Morton, Ill. During the month of June, 1975 Rose transported 75 shipments weighing 3,128,656 pounds for revenues of $107,051.58 from points in Illinois and one point in Indiana to points in California, Texas, Louisiana, Oklahoma, Arizona, Arkansas, and Oregon. Revenues for the year 1974 of $19,428,000 were the highest in the history of the company's operations. It contends that all of the traffic, referred to above, would be subject to diversion if the application is approved.

Most of the protestants are heavy haulers. Some are carriers of either general commodities or of iron and steel. The general commodity carriers oppose the applications to the extent that so-called "twilight zone" commodities (principally iron and steel articles) could be transported by vendee by joining the authority to be purchased with its existing authorities. Territorially, six carriers (Daily, Hennis, Home, Mercury, Moss, and Vance) are primarily interested in traffic moving to the south, whereas the remaining protestants are primarily interested in traffic moving to points which are, generally, west of the Mississippi River. Protestants are participating in the movement of traffic to these areas. Protestants' opposition is not directed to the so-called "direct" service that vendee could perform under the certificate from York, Pa. and points within 10 miles thereof but, rather, is directed to the joinder of this authority with vendee's presently held heavy hauling authority as well as the related application for elimination of the York gateway. Protestants point out that vendor did not participate to any great extent in joint-line service for the movement of such traffic and that while vendee has shown joint-line operations, vendee has never interchanged traffic with the vendor. Moreover, protestants contend, the vendee was not an effective competitor prior to the commencement of its

temporary operations, and that approval of the applications will create a new competitor in the field and cause a substantial volume of traffic to be diverted from the protestants.

Certain protestants allege that pursuant to its temporary authority vendee has materially reduced the rates applicable to the transportation of iron and steel articles traffic to the Carolinas, Georgia and Florida, thus diverting substantial tonnage of such traffic from protestants and other carriers. These protestants view vendee's action as destructive competition and fear that approval of the application will result in further loss of tonnage and revenue causing a material adverse effect upon the operations of these protestants.

In rebuttal, vendee alleges that all of the protestants are substantial carriers showing continuous revenue and tonnage growth in each of the years 1970 through 1974. While it is true that the tonnage and revenues of some protestants have declined in 1975, this is attributed more to the general decline in the national economy during this period than to any diversion of traffic to vendee's temporary operations. Vendee further notes that virtually all of the protestants are either presently involved or have recently consummated acquisitions which extend their individual operations into areas served not only by vendee but the other protestants as well and that such extension of service has not had a substantial competitive impact upon any of the carriers involved in these proceedings. Vendee also notes that the traffic studies sponsored by protestants covered a period of time during which protestants were competing for traffic with vendee's temporary operation.

By way of further rebuttal, vendee stated that its iron and steel articles rates to the Carolinas, Georgia and Florida were published to meet the rate levels prescribed by protestant Mercury and nonprotestants Eagle Motor Lines, L & B Express and Tower Lines. Shortly after consummation of vendee's temporary authority, it consulted with appropriate traffic officials of its iron and steel shippers in the Pittsburgh, Pa. area and was provided with a list of various points in the Carolinas, Georgia and Florida to which traffic was moving, as well as an identity of the carriers who published rates applicable to such traffic. Upon review of the tariffs of these carriers, vendee discovered that their rates were not uniform to this area and thereafter published its tariff MF-ICC No. 8 which uniformly prescribes rates which are higher than the lowest rate published by the other four carriers as established in vendee's comparative rate analysis exhibits. Further, vendee notes that none of the protestants or other carriers protested the publishing of these rates, nor do they challenge the rate levels as being noncompensatory.

Discussion and Conclusions

The proposed purchase of the vendor's operating authority by the vendee is governed by section 5 of the Act. Under section 5(2)(b), the applicants are entitled to an order approving the transaction, if subject to such terms, conditions and modifications as are found to be just and reasonable, the proposal is within the scope of section 5(2)(a), and will be consistent with the public interest. In determining whether any proposed transaction meets the public interest test of section 5(2)(b), section 5(2)(c) prescribes specific statutory criteria, including the effect of the proposed transaction upon the adequacy of transportation service to the public, the total fixed charges resulting from the proposed transaction, and the interest of the carrier employees affected. Also, the terms of the proposed transaction must be found to be just and reasonable. In addition to the statutory criteria, other criteria have been developed over the years by the courts and by this Commission as aids in determining public interest. See *Seaboard Air Line R. Co.—Merger—Atlantic Coast Line,* 320 I.C.C. 122, 125-130. Implicit in these criteria is the responsibility to evaluate the

anti-competitive impact of the proposal upon competing carriers and to preserve a structurally adequate balance of transportation service. Moreover, whether a particular transaction is in the public interest is to be determined in the light of the national transportation policy, among the objectives of which is the development of a more efficient and economical transportation system. Thus, a more coordinated, improved economical, efficient, and expeditious service to the public and the possibility of reductions in rates are appropriate factors for consideration in section 5 proceedings. See *Seaboard Air Line R. Co.—Merger—Atlantic Coast Line,* 320 I.C.C. 122, 207.

As used in section 5, the term "public interest" is not a concept without ascertainable criteria, but has a direct relation to the adequacy of the national transportation system, to its essential conditions of economy and efficiency and to appropriate provisions and best use of transportation facilities. See *New York Central Securities Co.* v. *United States,* 287 U.S. 12, 25. The phrase "consistent with the public interest" means the same as compatible with the public interest or not contradictory or hostile to the public interest. See *Merchant's Dispatch, Inc.—Purchase—Smathers,* 25 M.C.C. 407, 409; *Chesapeake & O. R. Co.—Control—Baltimore & O. R. Co.,* 317 I.C.C. 261, 285; and *Pacific Power and Light Co.* v. *Federal Power Comm.,* 111 F. (2d) 1014, 1016. In *Pacific Power, supra,* at 1016, the court said that the "phrase 'consistent with the public interest' does not connote a public benefit to be derived or suggest the idea of a promotion of public interest." Instead, the "thought conveyed is merely one of compatibility."

Also, in a section 5 proceeding involving the acquisition of motor carrier authority, one of the issues to be determined is whether the authority sought to be transferred is dormant. Most of the protestants herein contend that the rights of the vendor have been partially dormant both as to territory and commodity. Contrary to protestants' con-

tentions, the Administrative Law Judge is of the opinion that the applicants herein have met their burden of establishing that the vendor conducted substantial and representative operations pursuant to its authority for a reasonable period of time prior to the commencement of temporary operations by the vendee and its predecessor. In reaching this conclusion, consideration has been given to the nature of the commodities transported, the number of shipments, and the wide geographic area of the vendor's operations. During the relevant period, as hereinbefore noted, the vendor transported some 759 shipments to most of the States embraced within its certificate, and while the predominant commodity was refrigeration machinery, the evidence shows the transportation of such other heavy hauling commodities as body valves, containers, gondolas, expansion joints, machinery, jigs, boilers, plates, turbines, regulators, bowl liners, connecting belts, iron bodies, cell machinery, gears, machinery parts, drill barge, and gate parts.

Regarding the test of substantiality, the Commission has ruled that it is a flexible "standard gauged according to the nature of the commodity transported and the type of service performed, as opposed to a hard and fast rule requiring proof of service in each State, city, or other geographical area designated. As the nature of the commodity or service becomes more narrowly confined or specialized, a greater leniency can be shown in determining whether vendor has conducted a substantial service throughout his authorized territory." (*Knox Motor Service, Inc.—Purchase (Portion)—K & A Truck Lines, Inc.,* 93 M.C.C. 26, 30. As applied to a heavy hauling carrier, the Commission held in *C & H Transportation—Purchase—Gulf Southwestern,* 90 M.C.C. 636, 640, 641, that because of "the specialized type of service vendor is authorized to render, its operations necessarily are sporadic and it would not be expected to operate with the same degree of regularity as carriers engaged in the transportation of general commodities." With

respect to the question as to whether the vendor transported a sufficient variety and number of commodities, the Commission has held that atomization of a carrier's authority, whether it be "general commodities" or specialized commodities, by the listing of specific commodities and the exclusion of others, is not in the public interest and is generally against Commission policy. See *U. S.* v. *Carolina Freight Carriers,* 315 U.S. 475, 483-484; *Jones Motor Co., Inc.—Control—Mundy Motor Lines,* 90 M.C.C. 899, 908; *Carolina Freight Carriers—Purchase—Kilgo Motor Freight, Inc.,* 104 M.C.C. 188, 192. *In Carolina—Purchase—Kilgo, supra,* 104 M.C.C. at 192, the Commission stated that:

> "We are not persuaded by Bell's argument that vendor's general commodity authority to serve Pittsburgh should be restricted to those commodities actually shown to have been transported or for which witnesses testified. A number of specified commodities have been discussed, and the classification of general commodities is, after all, composed only of a conglomerate of such individual commodities. Moreover, it is against Commission policy to pulverize general-commodities rights by restricting them to, or excluding from them, certain commodities."

The remarks from the cases cited above are equally applicable here. Accordingly, the Administrative Law Judge is of the opinion and finds the vendor's operations have been extensive enough geographically and sufficiently diversified as to constitute substantial and representative operations pursuant to its authority for a reasonable period of time prior to the commencement or temporary operations and that it therefore met the test of substantiality during the relevant period.

The matter of traffic diversion presents no real issue. While most of the protestants contend that a substantial volume of their traffic would be susceptible to diversion,

their evidence in this regard was not specific enough to provide a basis for drawing meaningful conclusions. Some showed traffic losses during the relevant periods but failed to relate such losses to the operations or proposed operations of the vendee. Thus, any loss shown by protestants may be attributed to the state of the economy rather than to the vendee's operations. Mere apprehension of loss of traffic does not constitute a basis for disapproving the transaction. In the past, transactions similar to the instant proposal have been approved, if shown to be otherwise in the public interest, notwithstanding the loss of some traffic and revenue by competing carriers. Most of the protestants are financially strong, some presently enjoying the highest revenues in their history. The record clearly demonstrates that protestants' overall stability and financial status will enable them to offset the additional competition that may result from the proposed transaction. Nor will the competitive impact upon the protestants be significantly aggravated by reason of tacking the vendee's authority with the authority sought to be acquired, since the single-line traffic resulting from tacking the two segments of authority will merely be a substitute for the joint-line operations previously conducted by the vendee and other carriers. The Administrative Law Judge therefore concludes that the volume of traffic to be lost by protestants as a result of the proposed transaction will be insubstantial and will not seriously affect their operations, service or revenues.

The total consideration of $200,000 was arrived at through arms length negotiations between vendor and vendee. The vendee estimates an annualized additional after-tax profit of $73,104 as a result of approval of the transaction. This additional annual after-tax profit would enable vendee to pay off its investment in operating rights in slightly over five years, yielding an annual after-tax return of 18.27 percent on a total investment of $400,000 ($200,000 for operating rights and $200,000 for noncom-

petition covenants). In consideration of the territory encompassed in the authority sought to be acquired, and the potential earnings to be derived therefrom, it is concluded that the price is fair to the parties concerned. The evidence warrants a finding that the vendee possesses adequate equipment, facilities and resources to effectively serve the purchased rights, and that vendee is financially and otherwise a fit and proper party to acquire said rights. The price and terms of payment and financing are reasonable and the total fixed charges resulting from the proposed transaction are well within the financial capability of vendee. The fixed charges will be minimal, and will not be contrary to the public interest. The transaction does not contemplate a guaranty or assumption of payment of dividends. No equipment or other physical properties of vendor are being transferred and no adverse affect on carrier employees will result from consummation of the transaction. This proceeding does not constitute a major federal action significantly affecting the quality of the human environment.

As hereinbefore noted, vendor's certificate contains a restriction against tacking. This restriction applies to the tacking of this authority with other authorities of vendor, and has no reference to tacking or joining that authority with separate authorities held by vendee. See *Alterman Transport Lines, Inc., Extension—Council Bluffs,* 94 M.C.C. 187, 192-193 and *Cocoa Powder From New York, N.Y. to Council Bluffs,* 322 I.C.C. 255, 257. Prior to the adoption of the Commission's gateway elimination rules in *Gateway Elimination,* 119 M.C.C. 530, the Commission consistently refused to impose tacking restrictions in acquisition proceedings under section 5 of the Act in the absence of a detailed showing that existing carriers have any real need for such protection. *G. F. Boyd Control,* 65 M.C.C. 433; *George C. Rawlings Extension—Emporia,* 78 M.C.C. 636 and *Penn Yan Express, Inc.—Purchase (Portion)—Van Transport Lines, Inc.,* 87 M.C.C. 365. This policy was uniformly followed even in those situations where an applicant stipu-

lated with a protestant that such a restriction against tacking could be imposed. See *Chemical Tank Lines—Control and Merger—Lehman,* 87 M.C.C. 333 and *Dealers Transit, Inc.—Control and Merger—Rowe Transfer & Storage Co.,* 87 M.C.C. 571. The fact that a seller's authority might contain a restriction prohibiting seller from using the authority in conjunction with other authorities held by seller did not change this policy, and the tacking restrictions were deleted when the certificate was reissued in the name of the buyer. *Cocoa Powder From New York, N.Y., to Council Bluffs,* 322 I.C.C. 255, 257. Accordingly, prior to the adoption of the gateway elimination rules, vendee could acquire the authority of vendor without a restriction against tacking unless protestants made a detailed showing of a real need for the imposition of such restriction.

In these proceedings, vendee seeks elimination of the tacking restriction presently contained in vendor's certificate so as to make possible through, single-line service from origins in its present 19 State heavy hauling service area to points in the destination area contained in vendor's certificate. Approval of this request is subject to the principles set forth in the gateway elimination case, 119 M.C.C. 530, in which the Commission stated:

> "In addition to all other considerations, where one existing interstate motor common carrier seeks to extend its irregular-route authority through the purchase of other existing irregular-route rights, and the possibility of tacking is involved (which, in effect, creates a gateway . . .), the applicant carriers shall also be required to give notice in the application with respect to such tacking possibilities and to prove that the present or future public convenience and necessity require that those authorities be tacked or joined." (119 M.C.C. at pages 552, 553).

The Commission further stated at page 553 that if a need for tacking can be shown at the time the purchase is ap-

proved, "then this Commission will grant the operating authority directly between the points that could be served by the tacking of those operating rights." Also, at page 553, the Commission observed that if it found "for the applicant and against the protestants, there would be a reviewable record to justify the grant of authority and the bypassing of the gateway. This will allow irregular-route motor common carriers to utilize acquisitions and mergers as a means of growth and at the same time will eliminate, to the extent required by the present or future public convenience and necessity, unnecessary fuel-wasting circuity."

As reflected in *Gateway Elimination, supra,* matters of tacking and elimination of gateways are closely interwoven. While the gateway decision, 119 M.C.C. at 553, states that an applicant in a unification proceeding must prove that the present or future public convenience and necessity require the tacking, a subsequent policy statement issued by the Commission on December 3, 1974, indicated, among other things, that the criteria expressd in *Childress—Elimination Sanford Gateway,* 61 M.C.C. 421 and *Maryland Transp. Co., Inc. Extension—Specified Commodities,* 83 M.C.C. 451 will be applicable to such gateway eliminations. The criteria established in *Childress* are as follows:

> "In an application such as the instant one, involving the elimination of a gateway and seeking authority which would enable operation over more direct routes, the essential facts to be determined, in the absence of testimony by public witnesses, are (1) whether applicant is actually transporting a substantial volume of traffic from and to the points involved by operating in good faith through the gateway and, in so operating, is effectively and efficiently competing with the existing carriers, and (2) whether the elimination of the gateway requirement would enable applicant to institute a new service or a service so different from that presently provided as to materially improve applicant's competitive position to the detriment of existing carriers. In the former instance, a grant of the authority sought is justified solely upon proof that the proposed operation results in operating economies, which, although primarily of benefit to the applicant, indirectly benefit the public through the medium of more efficient and economical service. In the latter instance, however, where the elimination of the gateway requirement would allow a new service, or would provide applicant with a substantial competitive advantage not previously enjoyed, it is incumbent upon applicant to prove public convenience and necessity the same as in any other application for new authority." *G. N. Childress—Sanford Gateway,* 61 M.C.C. 421, 428.

The evidence of record relating to the need for tacking consists of traffic studies showing interchange operations by the vendee from points in its present service area to points in the destination territory embraced in the vendor's certificate and the testimony of supporting shippers. As to vendee's interchange operations, vendee's traffic study for the period January 2, 1969 through July 16, 1975 lists 2,242 joint-line shipments weighing 76,159,413 pounds, moving from points in vendee's present 19 State service area to points in the destination territory of vendor's certificate which is the subject of this transaction. All of this traffic was handled pursuant to either the Heavy Haulers Red Book Plan of Interchange or pursuant to separate tariff concurrences between vendee and other carriers. Although none of this traffic was interchanged with vendor, the study, nevertheless, shows substantial interline activity on the part of the vendee in the involved area and it further shows that there was considerable demand for joint-line service into the area. Since the single-line service proposed by the vendee will be in substitution of its prior joint-line operations, it cannot reasonably be held that such service is entirely new or so different as to give the vendee a substantial competitive advantage over existing carriers. In *Su-*

perior Trucking Co., Inc.—Purchase—Arthur Morgan, 93 M.C.C. 64, 69 the Commission stated:

> "In view of the fact that the vendee has for several years participated in the transportation of the considered class of commodities to, from, or through vendor's territory in interline service, the proposed operations followed consummation herein would not constitute a new service in the sense that protestants have not been faced with the competition, even after excluding from consideration those interline shipments between applicants subsequent to the commencement of contract negotions. Rather, it would be continuance, albeit with some intensification and under single ownership, of a service to which the protestants have become accustomed."

The above-quoted excerpt is equally applicable here. The fact that some of the interline operations were not conducted on vendee's vehicles does not detract from the vendees' participation therein.

Also, vendee's traffic studies establish that the tacking operations conducted pursuant to temporary authority have been merely a continuation of the joint-line operations conducted prior to temporary authority. For example, the vendee showed some 587 shipments weighing 22,170,317 pounds handled during the period November 25, 1974 through June 30, 1975 moving in so-called "overhead" operations from a point in vendee's present service area to a point in the destination territory of the certificate which is the subject of this transaction. From the foregoing, particularly the fact that the vendee is merely substituting single-lin service for the prior joint-line service in which it participated, and since the competitive impact upon the protestants will be minimal or nonexistent, the Administrative Law Judge concludes that the proposed tacking and gateway elimination should be sustained under the criteria of *Childress, supra.*

In addition to meeting the *Childress* criteria, the vendee has shown through public witnesses that public convenience and necessity require the gateway elimination and the tacking proposal. Nine public witnesses supported the applications and they represent some of the nation's largest shippers. These witnesses testified to the need for a continuation of vendee's service under temporary authority and the need for the removal of the York, Pa. gateway. They also expressed a need for an improvement in the service of vendee, a carrier already serving them. Their major complaint against existing service is the difficulty in obtaining equipment in time of need. They believe that the single-line service of the vendee resulting from approval and consummation of applicants' proposals are necessary for their transportation requirements. Each of the public witnesses presently use a multiple-carrier system and none plans to divert traffic from existing carriers in the event the applications are approved. The supporting shippers will continue to use the service of protestants, since their only criticism of protestants relates to equipment shortages. Some of the protestants contend that the shipper evidence has no evidentiary value because it did not meet all of the technical requirements prescribed in *Novak Contract Carrier Application,* 103 M.C.C. 555, 557. While it is true some of the shippers failed to state specifically the volume of freight they would tender to the applicant, and could have been more precise in other areas, the Administrative Law Judge is not convinced that their evidence should be discounted or rejected on those grounds. Some of the shippers supporting the applications rank among the nation's largest, and although their evidence was somewhat general, there can be no doubt that, individually and collectively, they will tender substantial volumes of traffic to the vendee on a regular basis, and that such traffic will move to all points in the involved territory. It is accordingly concluded that, as relates to the tacking proposal and the gateway

elimination, the vendee has sustained its burden of proof under the standards prescribed in *Gateway Elimination, supra,* 119 M.C.C. at 553.

Some of the protestants sought to introduce an issue concerning vendee's level of rates under temporary authority operations. The vendee objects to this approach, stating that the Interstate Commerce Act contains specific provisions for consideration of rate questions, and that rate matters are not within the scope of section 5. As indicated above, the possibility of a reduction in rates resulting from single-line service is a benefit that may properly be considered in determining public interest. See *Seaboard Air Line R. Co.—Merger—Atlantic Coast Line, supra.* Thus, the question of rates may be a factor to be considered, but it is not of overwhelming significance. One matter relating to Exhibit 67 requires comment. That exhibit was marked for identification and described as an offer of proof. It was not admitted into evidence at the hearing. After further study of the matter, the Administrative Law Judge is of the opinion that the exhibit should be rejected on the ground that the contents thereof state conclusions rather than facts. Even if admitted into evidence, Exhibit 67 is not of sufficient materiality to alter the conclusion reached herein that both applications should be granted.

Arguments and contentions of the parties not specifically discussed herein have been considered and found to be without merit.

Ultimate Findings and Order

Upon consideration of all evidence of record, the Administrative Judge finds:

(1) That in No. MC-F-12331 the purchase by Aero Trucking, Inc. of a portion of the operating rights of Miller's Motor Freight, Inc., and the acquisition by Edward J. Conto, Jack M. George, and James N. George of control of said operating rights through the transaction, upon the

terms and conditions set forth above and in the application, which terms and conditions are found to be just and reasonable, constitutes a transaction within the scope of section 5(2)(a) of the Act and will be consistent with the public interest, and that if the transaction herein authorized is consummated, Aero Trucking, Inc. will be entitled to operate under the operating rights granted in No. MC-41915 (Sub-No. 33), which rights are hereby authorized to be unified with the rights otherwise confirmed in it and to be embraced in a certificate to be issued in its name with duplications eliminated.

(2) That in No. MC-60014 (Sub-No. 38), (as a gateway elimination matter directly related to the purchase transaction authorized in No. MC-F-12331) vendee Aero Trucking, Inc. has satisfied its burden of proof necessary to authorize the tacking of the operating rights to be purchased with the rights presently held by the vendee, and that contingent upon consummation of that purchase transaction, a certificate of public convenience and necessity should be issued to Aero Trucking, Inc. authorizing operations directly between the points to be served to the extent authorized herein.

(3) That Aero Trucking, Inc. is fit, willing and able properly to perform such service and to conform to the requirements of the Interstate Commerce Act and the rules and regulations of the Commission thereunder.

(4) That this decision does not constitute a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.

It is therefore ordered, That in No. MC-F-12331 the purchase by Aero Trucking, Inc. of the described operating rights of Miller's Motor Freight, Inc. and acquisition by Edward J. Conto, Jack M. George and James N. George of control of said rights through the purchase be, and they are

hereby, approved and authorized, subject to the conditions set forth herein.

It is further ordered, That in No. MC-60014 (Sub-No. 38), the directly related gateway elimination matter, the application be, and it is hereby, granted, that contingent upon consummation of the transaction authorized in No. MC-F-12331, a certificate of public convenience and necessity be issued to Aero Trucking, Inc. authorizing operations in interstate or foreign commerce by motor vehicle directly between the points to be served in the manner set forth in the findings herein, and that in all other respects the application be, and it is hereby, denied.

It is further ordered, That if the parties to the transaction authorized herein desire to consummate same, they shall (1) promptly take such steps as will insure compliance with section 215, 217 and 221(c) of the Interstate Commerce Act, and rules and regulations prescribed thereunder, and (2) confirm in writing (in duplicate) to the Commission immediately after consummation, the date upon which consummation actually took place.

It is further ordered, That if the authority granted herein is exercised, within sixty (60) days after consummation Aero Trucking, Inc. shall submit to the Commission for consideration a sworn statement, and one copy thereof, showing all expenditures made, by dates, or to be made, in connection with the transaction, including the consideration, legal and other fees, witness fees and expenses, and any other costs incident to the transaction, including any notes issues or loans obtained in order to consummate the transaction, indicating the account number and title to which each item has been made, or is to be, debited or credited.

It is further ordered, That unless the authority granted herein is exercised within 180 days after the effective date of a final Commission order herein, the authority granted

shall be vacated and this order shall be of no further force or effect.

It is further ordered, That the authority granted herein shall not be exercised prior to the date of service of a notice or order stating that this decision has become the order of the Commission.

It is further ordered, That the recital herein of balance sheet and other financial data shall not be construed as approving accounting methods which have been followed or expenditures represented thereby.

It is further ordered, That this order, in the absence of a stay or postponement by the Commission or the timely filing of exceptions, shall be effective 35 days from the date it is served.

Dated at Washington, D.C., this 11th day of December, 1975.

By the Commission, William J. Gibbons, Administrative Law Judge.

ROBERT L. OSWALD,
Secretary.

(SEAL)

APPENDIX E

Statutes and Regulations Involved

SECTION 10(e), ADMINISTRATIVE PROCEDURE ACT, 5 U.S.C. § 706

"To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to section 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error."

National Transportation Policy (Chapter 8, Part II of the Interstate Commerce Act), 49 U.S.C. preceding § 301

"*National transportation policy.* Act Sept. 18, 1940: 'It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act [chapters 1, 8, 12, 13, and 19 of this title], so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions; —all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act [chapters 1, 8, 12, 13 and 19 of this title] shall be administered and enforced with a view to carrying out the above declaration of policy.' "

§ 5, par. (2). Unifications, mergers, and acquisitions of control; procedures applicable

(a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b) or paragraph (3) of this paragraph—

(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease, or contract to operate the properties, or any part

thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; or

(ii) for a carrier by railroad to acquire trackage rights over, or joint ownership in or joint use of, any railroad line or lines owned or operated by any other such carrier, and terminals incidental thereto.

(b) Whenever a transaction is proposed under subdivision (a) of this paragraph, the carrier or carriers or person seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicle are involved, the persons specified in section 305(e) of this title), and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing; and a public hearing shall be held in all cases where carriers by railroad are involved unless the Commission determines that a public hearing is not necessary in the public interest. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subdivision (a) of this paragraph and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable: *Provided*, That if a carrier by railroad subject to this chapter, or any

person which is controlled by such a carrier, or affiliated therewith within the meaning of paragraph (6) of this section, is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

(c) In passing upon any proposed transaction under the provisions of this paragraph, the Commission shall give weight to the following considerations, among others: (1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected.

(d) The Commission shall have authority in the case of a proposed transaction under this paragraph involving a railroad or railroads, as a prerequisite to its approval of the proposed transaction, to require, upon equitable terms, the inclusion of another railroad or other railroads in the territory involved, upon petition by such railroad or railroads requesting such inclusion, and upon a finding that such inclusion is consistent with the public interest.

(e) No transaction which contemplates a guaranty or assumption of payment of dividends or of fixed charges, shall be approved by the Commission under this paragraph except upon a specific finding by the Commission that such guaranty or assumption is not inconsistent with the public interest. No transaction shall be approved under this paragraph which will result in an increase of total fixed charges, except upon a specific finding by the Commission that such increase would not be contrary to public interest.

(f) As a condition of its approval, under this paragraph or paragraph (3), of any transaction involving a carrier or carriers by railroad subject to the provisions of this chapter, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Such arrangement shall contain provisions no less protective of the interests of employees than those heretofore imposed pursuant to this subdivision and those established pursuant to section 565 of Title 45. Notwithstanding any other provisions of this chapter and chapters 8 and 12 of this title, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees.

(g) In any case arising under this paragraph which involves a common carrier by railroad, the Commission shall—

(i) within 30 days after the date on which an application is filed with the Commission and after a certified copy of such application is furnished to the Secretary of Transportation, (A) publish notice thereof in the Federal Register, or (B) if such application is incomplete, reject such application by order, which order shall be deemed to be final under the provisions of section 17 of this title;

(ii) provide that written comments on an application, as to which such notice is published, may be filed within 45 days after the publication of such notice in the Federal Register;

(iii) require that copies of any such comments shall be served upon the Secretary of Transportation and the Attorney General, each of whom shall be afforded 15 days following the date of receipt thereof to inform the Commission whether he will intervene as a party to the proceeding, and if so, to submit preliminary views on such application;

(iv) require that all other applications, which are inconsistent, in whole or in part, with such applications, and all petitions for inclusion in the transaction, shall be filed with the Commission and furnished to the Secretary of Transportation, within 90 days after the publication of notice of the application in the Federal Register;

(v) conclude any evidentiary proceedings within 240 days following the date of such publication of notice, except that in the case of an application involving the merger or control of two or more class I railroads, as defined by the Commission, the Commission shall conclude any evidentiary proceedings not more than 24 months following the date upon which notice of the application was published in the Federal Register; and

(vi) issue a final decision within 180 days following the date upon which the evidentiary proceeding is concluded.

If the Commission fails to issue a decision which is final within the meaning of section 17 of this title within such 180-day period, it shall notify the Congress in writing of such failure and the reasons therefor. If the Commission determines that the due and timely execution of its functions under this paragraph so requires, or that an application brought under this paragraph is of major transporta-

tion importance, it may order that the case be referred directly (without an initial decision by a division, individual Commission, board, or administrative law judge) to the full Commission for a decision which is final within the meaning of section 17 of this title.

"(b) The Secretary of Transportation may propose any modification of any transaction governed by this paragraph which involves a carrier by railroad. The Secretary shall have standing to appear before the Commission in support of any such proposed modification.

SECTION 207(a), INTERSTATE COMMERCE ACT,
49 U.S.C. § 307(a)

"Subject to section 310 of this title, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if it is found that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this chapter and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied: *Provided, however,* That no such certificate shall be issued to any common carrier of passengers by motor vehicle for operations over other than a regular route or routes, and between fixed termini, except as such carriers may be authorized to engage in special or charter operations."

49 CFR § 1065.1 Gateways and tacking—irregular-route motor common carriers of property

"(a) Where a common carrier by motor vehicle authorized to transport property in interstate or foreign commerce holds separate and unrestricted irregular-route certificated authorities issued by the Interstate Commerce Commission, which authorities have a common point of service

(a 'gateway') to which a given shipment may be transported under one authority and from which the same shipment may be transported under the other, the carrier is required, upon reasonable request therefor, to furnish through service on the shipment under a combination of the authorities and may do so without transporting the shipment through the common service point or points; *provided:* (1) That the certificated authorities so utilized were issued to the carrier pursuant to an application proceeding pending before the Interstate Commerce Commission on or before November 23, 1973, (2) that none of the authorities is restricted against such joining, (3) that the most direct highway distance between the points [1] to be served is not less than 80 per cent of the highway distance between such points over the carrier's authorized routing through the gateway, (4) that a lawful and appropriate tariff covering the movement via the gateway was on file with the Interstate Commerce Commission on November 23, 1973, or that the carrier had pending an application on the aforementioned date which was subsequently granted, and (5) the carrier follows the procedures prescribed in paragraph (d) (1) of this section.

(b) Except where expressly allowed under paragraph (a) of this section, or on movements of 300 miles or less, or where its certificated authorities specifically authorize such tacking or joinder, a common carrier by motor vehicle authorized to transport property, in interstate or foreign commerce, is prohibited from joining any of its irregular route certificated authorities on and after the effective date of this regulation. Any common carrier by motor vehicle providing such prohibited service on or before the date this regulation takes effect shall cease such operations on

[1] In those cases where a carrier may serve a municipality or unincorporated community pursuant to this rule without the necessity of observing a gateway specified in its certificated authorities; the carrier shall serve all points within its terminal area at such municipality or unincorporated community in accordance with 49 CFR 1049.

or before the 60th day following the said effective date, unless it files an application for direct service operating authority pursuant to section 206 of the Interstate Commerce Act on or before the 60th day following the effective date. Such an application may have the support of the shipper or shippers currently served by the carrier applicant, shall be filed and processed in accordance with the procedures prescribed in paragraph (d)(2) of this section, and shall be determined in accordance with the requirements of section 207 of the Interstate Commerce Act giving full effect to the applicant's past service and operations through the gateway. Any such carrier filing such an application in good faith may continue to provide such service by observing its gateways or gateway until final disposition of its application proceeding.

(c) The mileages utilized in determining whether the most direct highway distance between the points to be served is not less than 80 per cent of the highway distance between such points over the carrier's authorized routing through the gateway, shall be calculated from the point of origin (i.e., the point on the carrier's authorized route where the shipment begins its journey) to the point of destination (i.e., the point on the same carrier's authorized route where the shipment ends its journey) of the shipment or shipments involved.

(d) (1) A carrier seeking to eliminate gateways pursuant to paragraph (a) of this section shall be required to adhere to the following procedures:

(i) File a letter and two copies thereof with this Commission at its offices in Washington, D.C. and one copy with this Commission's field office having jurisdiction over the point at which the carrier is domiciled, describing the gateways to be eliminated (this should include origin, destination, and gateway, applicable mileages, and a suitable map), and attaching either (A) copies of appropriate tariff provisions establishing that such through services were offered by the carrier on November 23, 1973, or (B) a verified statement establishing that the certificated authority enabling operations through the gateway were issued to the carrier pursuant to an application proceeding pending before the Interstate Commerce Commission on November 23, 1973.

(ii) Allow 15 days from the date of publication in the FEDERAL REGISTER of a notice of the carrier's intention to eliminate its gateways and for Commission review of the letter submission. Protests to such notices must be received at the Commission at Washington, D.C. within 10 days of the date of that publication. If the carrier is not otherwise informed by this Commission, operations may commence at the termination of the said 15-day period. This Commission reserves the right to require that a carrier terminate these operations if it should later be discovered that the carrier's operations do not qualify for the benefits of this rule.

(iii) Letter submissions under this rule will not be accepted after June 4, 1974, except in those cases in which the certificated authority to be joined was issued pursuant to an application proceeding pending before the Interstate Commerce Commission on November 23, 1973. In such instances, the carrier shall make such filing within 60 days from the date of issuance of the authority in issue.

(2) A carrier that maintains gateway operations which do not meet the criteria set forth in paragraph (a) of this section may, if it desires to continue to provide such through service to the public, file OP-OR-9 applications with this Commission seeking direct-service authority. Such an application shall include:

(i) In bold print in the upper right-hand corner of page 1, the words GATEWAY ELIMINATION.

(ii)(A) A carrier relying on certificated authorities issued to it on or prior to November 23, 1973, shall submit copies of appropriate tariff provisions establishing that

such through services were offered by the carrier on November 23, 1973.

(b) A carrier relying on certificated authorities issued to it after November 23, 1973, as a result of an application pending on that date shall present verified statements establishing either (1) that the service through the gateway point has been performed (as in the case of the carrier's demonstrated participation in deteriorating interline or interchange service) on November 23, 1973, or (2) that a public need for such through service exists.

(iii) An initial verified statement in support of the application. This should include all of the evidence applicant plans to present in the proceeding, including (to the extent pertinent) evidence of the applicant's (or its established predecessor-in-interest's) past operations via the gateway for the 2 years preceding November 23, 1973, and the relevant matters and evidence set forth in subdivision (ii) of this subparagraph. Evidence of supporting shippers need not be presented except as set forth in subdivision (ii) (B) of this subparagraph but will be considered and accorded appropriate weight if submitted.

(iv) Such applications must be filed on or before the 60th day following the effective date of these regulations, or within 60 days following the date of issuance of the certificated authorities so to be joined if such authorities are issued to the carrier pursuant to an application proceeding pending before the Interstate Commerce Commission on November 23, 1973, whichever date last occurs. The application will be processed in accordance with the normal procedures of the Interstate Commerce Commission as modified in the Federal Register publication of a notice of the filing of such applications (which shall reflect the procedure outlined in the Commission's report and order in *Gateway Elimination*, 119 M.C.C. 530).

(e) Any motor carrier which has pending on the effective date of these regulations an application for the elimination

of a gateway and which desires to utilize the rules set forth above, should notify the Director of the Office of Proceedings of the Interstate Commerce Commission of the pendency of such application and should include the pertinent docket number. Duplicate applications should not be filed."

Gateway Eliminations

POLICY STATEMENT

DECEMBER 3, 1974.

The Commission today adopted the following procedures for handling applications under sections 5(2) and 212(b) of the Interstate Commerce Act where the joinder of separate irregular route rights are proposed and the provisions of Ex Parte No. 55 (Sub-No. 8), *Gateway Eliminations*, 109 M.C.C. 530, are pertinent.

On applications under sections 5(2) and 212(b) where a joinder of unrestricted separate segments of irregular route authority is involved and which applications were filed prior to November 23, 1973, and decided and consummated as of November 23, 1973, or filed prior to November 23, 1973, but consummated after such date and in which a certificate is awaiting issue, the parties will have 60 days from issuance of this notice to file a letter-notice or an OP-OR-9 application pursuant to the Gateway Elimination Rules (49 CFR Part 1065) to eliminate any gateways created by the unification of the separate irregular route authorities. Failure to file such request within the time period will result in imposition of a prohibition against tacking. On applications filed prior to November 23, 1973, but which for various reasons have not been consummated, the parties also will have 60 days from date of this notice to file a letter of intent to eliminate any resulting gateways. If the evidence presently of record is adequate tacking of the separate irregular route authorities involved could be authorized and the gateways may be eliminated within 60 days of

consummation of the transaction pursuant to the gateway rules.

On applications under section 5(2) filed after November 23, 1973, and which are (1) decided and consummated but no certificate has been issued, (2) decided and not consummated, or (3) not finally determined, the carriers are given 60 days from the date of this notice to supplement the existing record to support tacking of the separate authorities. During the same 60 days, an OP-OR-9 application is to be filed for elimination of the resulting gateway and such will be handled as a directly related matter to the section 5 proceedings.

In all future applications under section 5(2) the parties will be required to submit the requisite proof with the application under section 5(2) to justify tacking of the separate irregular route rights and to file a directly related OP-OR-9 application for the elimination of the gateway and performance of direct through operations. Generally, the criteria in *Childress—Elimination Sanford Gateway,* 61 M.C.C. 421 and *Maryland Transp. Co. Ext.—Specified Commodities,* 83 M.C.C. 451, will be applicable to such gateway eliminations, giving consideration, of course, to the fact that irregular route rights under separate ownerships are involved. In section 5(2) proceedings, questions of tacking will be handled in the section 5(2) proceeding and where gateway eliminations are sought, they will be handled as a matter directly related to the proposed unification. Failure to seek and justify gateway elimination in any of the above-described situations will result in the imposition of a "no tacking" restriction. In section 212 (b) proceedings involving a proposed unification of irregular routes where tacking is proposed, applicants will be permitted to supplement the applications and present proof at the time of filing which would justify tacking of the involved authorities. Such tacking will be granted if warranted. Concurrently with the filing of the transfer application, the purchasing carrier will be required to file an OP-OR-9 application for elimination of the resulting gateway.

APPENDIX F

Revenues and Tonnages of Parties

Hearing Exhibit No. 23
Page 1 of 2 pages

Carrier	1974		1973		1972		1971		1970	
	Revenues	*Tonnage*	*Revenues*	*Tonnage*	*Revenues*	*Tonnage*	*Revenues*	*Tonnage*	*Revenues*	*Tonnage*
1. Ace Doran	$29,072,000	1,283,000	$21,399,000	1,088,000	$17,302,000	975,000	$13,547,000	784,000	$9,073,000	502,000
2. Bowman	71,744,000	1,740,000	61,328,000	1,695,000	58,229,000	1,628,000	54,949,000	1,640,000	47,500,000	1,558,000
3. C & H	73,746,000	1,157,000	58,987,000	1,135,000	48,643,000	1,019,000	45,453,000	960,000	40,309,000	915,000
4. Colonial Fast Freight	4,140,000	250,000	3,595,000	257,000	3,371,000	257,000	2,980,000	239,000	2,695,000	226,000
5. Daily Express	24,363,000	551,000	20,014,000	521,000	16,183,000	424,000	15,212,000	583,000	13,417,000	472,000
6. Dallas & Mavis	31,588,000	—	25,277,000	746,000	19,364,000	531,000	17,576,000	524,000	14,523,000	425,000
7. Hennis	72,225,000	1,319,000	69,603,000	1,444,000	61,317,000	1,302,000	58,988,000	1,348,000	59,044,000	1,510,000
8. Home Transportation	18,617,000	353,000	16,474,000	349,000	12,994,000	294,000	10,910,000	251,000	11,465,000	285,000
9. International Transport	55,036,000	613,000	42,537,000	612,000	30,308,000	445,000	24,555,000	359,000	21,540,000	316,000
10. H. J. Jeffries	12,171,000	316,000	9,570,000	318,000	8,788,000	305,000	7,615,000	259,000	7,120,000	253,000
11. Mercury Motor Express	31,025,000	482,000	28,177,000	499,000	25,440,000	755,000	23,108,000	394,000	21,031,000	368,000
12. Moss Trucking	7,780,000	285,000	6,660,000	308,000	5,426,000	263,000	4,553,000	222,000	4,079,000	201,000
13. Pittsburgh & New England	11,201,000	483,000	9,069,000	458,000	6,594,000	317,000	6,605,000	345,000	6,171,000	349,000
14. J. W. Rose	19,428,000	246,000	15,277,000	222,000	11,809,000	170,000	11,474,000	168,000	9,848,000	157,000
15. Sammons	14,325,000	—	11,180,000	—	7,208,000	253,000	5,055,000	172,000	2,554,000	88,000
16. Vance Trucking	4,162,000	257,000	3,247,000	222,000	2,540,000	196,000	2,004,000	161,000	1,815,000	149,000
17. Wales Transport	16,013,000	—	13,878,000	—	11,459,000	—	9,421,000	—	8,222,000	—
18. Wilson Freight	93,968,000	1,627,000	88,777,000	1,623,000	70,686,000	1,444,000	63,083,000	1,370,000	54,146,000	1,305,000
Aero Trucking	18,381,000	1,063,000	16,423,000	994,000	13,106,000	—	10,368,000	663,000	8,627,000	549,000

Percentage of Growth—1970-1974

	Revenue	*Tonnage*
1. Ace Doran	220.4%	155.6%
2. Bowman	51.0%	11.7%
3. C & H	82.9%	26.4%
4. Colonial Fast Freight	53.6%	10.6%
5. Daily Express	81.6%	16.7%
6. Dallas & Mavis	117.5%	—
7. Hennis	22.3%	—12.6%
8. Home Transportation	62.4%	23.9%
9. International Transport	155.5%	94.0%
10. H. J. Jeffries	70.9%	24.9%
11. Mercury Motor Express	97.5%	31.0%
12. Moss Trucking	90.7%	41.8%
13. Pittsburgh & New England	81.5%	38.4%
14. J. W. Rose	97.3%	56.7%
15. Sammons	460.9%	—
16. Vance	129.3%	72.5%
17. Wales Transport	94.8%	—
18. Wilson Freight	73.5%	24.7%
Aero Trucking	113.1%	93.6%

No. 78-856

In the Supreme Court of the United States

OCTOBER TERM, 1978

AERO TRUCKING, INC., PETITIONER

v.

C & H TRANSPORTATION CO., INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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1. Petitioner applied to the Interstate Commerce Commission to eliminate the requirement that trips by its trucks between certain states pass through York, Pennsylvania. York is a mandatory "gateway" or point of intersection between petitioner's old routes and certain newly acquired routes.

An applicant seeking to eliminate a gateway must show that such elimination is required by the public convenience and necessity. 49 U.S.C. 307(a).

Under the Commission's prior decisions, this requires presentation of evidence from shippers showing that elimination of the gateway and establishment of direct routes would satisfy a public need that is unsatisfied by existing carriers and would not affect the operations of other carriers contrary to the public interest. See *Novak Contract Carrier Application*, 103 M.C.C. 555, 557 (1967). Alternatively, an applicant seeking to abandon an existing gateway may show that it is transporting a substantial volume of traffic through the gateway and that elimination of the gateway and adoption of direct routes would not disrupt the competitive status quo. See *Childress—Elimination of Sanford Gateway*, 61 M.C.C. 421, 428 (1952).

After hearings, the Commission authorized petitioner to eliminate the York gateway and thus provide direct route services from points in 18 states and the District of Columbia to points in 39 other states. This resulted in the creation of more than 600 new direct-route authorities. The Commission found that petitioner had proven facts sufficient to satisfy both the *Novak* and the *Childress* standards.

The court of appeals set aside a portion of the Commission's order and remanded the case for further factual findings and clarification (Pet. App. 1a-21a). The court affirmed the Commission's grant of direct-route authority from points in Pennsylvania and Ohio to points in North Carolina, South Carolina, Florida, and Georgia. It found, however, that the remaining grants were unsupported by substantial evidence. The court found insufficient evidence to sustain such grants under either the *Childress* test or the *Novak* test (Pet. App. 8a-17a).

2. We do not believe that this case warrants review, even though the lower court vacated much of the Commission's order. Although we do not agree with the court's decision,* we view the dispute as primarily factual in nature and as not presenting any unresolved legal question. As the court of appeals recognized, this case involves only the application of established Commission precedents (*Novak* and *Childress*) to a particular set of facts. Whether substantial evidence exists to support an order under those precedents is a question primarily within the province of the court of appeals. *Mobil Oil Corp.* v. *FPC*, 417 U.S. 283, 310 (1974); *Beth Israel Hospital* v. *NLRB*, No. 77-152 (June 22, 1978), slip op. 23.

The decision in this case should not have any significant effect on the Commission. Great numbers of gateway elimination cases were filed in 1974, under Commission regulations responding to the energy shortage of 1973-1974. Final decisions have been rendered in the vast majority of those cases, and few gateway elimination applications have been filed

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* In our view the court misunderstood the nature of the Commission's gateway elimination policy, did not recognize that changes in practice in 1973 permit gateway eliminations with greater liberality than previously, and substituted its judgment for that of the Commission on the weight of the evidence. See *FCC* v. *National Citizens Commission for Broadcasting*, 436 U.S. 775 (1978); *Ralston Purina Co.* v. *Louisville & Nashville R.R.*, 426 U.S. 476 (1976).

since then. The decision of the court of appeals thus has limited practical significance.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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JANUARY 1979

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-850

AERO TRUCKING, INC., *Petitioner*

v.

C & H TRANSPORTATION CO., INC.,
DAILY EXPRESS, INC. and
DALLAS & MAVIS FORWARDING CO., INC.,
Respondents

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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OPINIONS BELOW

JURISDICTION

STATUTES INVOLVED

STATEMENT OF THE CASE

Respondents are satisfied with Petitioner's presentation under these four headings.

QUESTION PRESENTED

Whether The Court Of Appeals Made A Fair Assessment Of The Record In Carrying Out Its Congressional Mandate of Determining Whether Findings By The Interstate Commerce Commission In A Specific

Adjudication Were Supported By Substantial Evidence.

REASONS FOR DENYING THE WRIT

Petitioner, the intervening respondent below, challenges the scope of review utilized by the United States Court of Appeals for the District of Columbia Circuit in Case No. 77-1389 in which that court partially vacated and remanded an order of the Interstate Commerce Commission (ICC) granting petitioner's Gateway Elimination Application at ICC Docket No. MC-60014, Sub 38. Neither the ICC nor the United States of America, statutory respondents below, has deemed it appropriate or necessary to join in the present petition or submit one of their own requesting a writ of certiorari.

It is a long-standing rule that orders of the ICC which are contrary to and without adequate support in the evidence are void and may be set aside by the courts. *Long Transport Corp.* v. *United States,* 75 F.Supp. 915, 924-925 (S.D. Colo. 1948) citing *Central Motor Carriers Assn.* v. *United States,* 321 U.S. 194 (1944). It has also been held that a certificate of public convenience and necessity cannot stand unless it is based on findings of fact which are supported by substantial evidence. *Norfolk and Western Ry. Co.* v. *United States,* 241 F.Supp. 974, 982 (N.D. Ohio 1965). *See also Wheatly* v. *Adler,* 407 F.2d 307, 310 (D.C. Cir. 1968) (an administrative order must be set aside if it rests on factual premises not based on substantial, record evidence).

In the present case, the court of appeals was unequivocal in its determination that much of the authority granted to petitioner in its Sub 38 application was unsupported by substantial evidence. In fact, a significant portion of the grant of authority was found to be unsupported by any evidence. *See* Opinion of Court Below, Petitioner's Appendix A at 8a. The Supreme Court has made its views known on a number of occasions with respect to questions of substantial evidence decided by courts of appeal.

> Whether on the record as a whole there is substantial evidence to support agency findings is a question which Congress has placed in the keeping of the courts of appeal. This Court will intervene only in what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied. *Universal Camera Corp.* v. *NLRB,* 340 U.S. 474, 491 (1951).

In *Mobil Oil Corp.* v. *FPC,* 417 U.S. 28 (1974) this Court reaffirmed the power of the courts of appeal to determine with finality whether an agency decision was supported by substantial evidence.

> [*Permian Basin Area Rate Cases,* 390 U.S. 747 (1968)], teaches that application of the three criteria of judicial review of Commission orders [substantial evidence, excess authority, and whether an agency order considers and protects both public and private interests] is primarily the task of the court of appeals. For this [Supreme] Court's authority is essentially narrow and circumscribed. The responsibility to assess the record to determine whether agency findings are supported by substantial evidence is not ours. 417 U.S. at 309.

Furthermore, when considering a petition for certiorari from a court of appeals decision concerning whether an agency action was supported by substantial evidence, the Supreme Court need only decide

whether the lower court has made a fair assessment of the record on the issue of substantiality. *NLRB* v. *Pittsburgh Steamship Co.*, 340 U.S. 498, 502 (1951). The assessment made by the Court of Appeals for the District of Columbia Circuit in the present case was not only eminently fair, but involved comprehensive consideration of all aspects of the record. Petitioner's attacks upon the scope of review utilized by the court of appeals completely ignore the function of that court as defined by Congress.

Judge Bazelon has expressed the view that "the limited scope of review under the Administrative Procedure Act does not exclude review of underlying facts and assumptions upon which the agency acted." *National Cable T.V. Assoc.* v. *FCC*, 479 F.2d 183, 192 n.27 (D.C. Cir. 1973). In order to make a well-reasoned decision in the present case, the court of appeals was virtually required to examine the full panoply of facts underlying the ICC's decision, and when a number of these facts were found to be nonexistent, the court had no choice but to vacate that portion of the agency order unsupported by facts of record. *See* Opinion of Court Below, Petitioner's Appendix A at 21a.

> Where as here a regulatory agency has ignored factors which are relevant to the public interest, the scope of judicial review is sufficiently broad to order their consideration. *Transcontinental Gas P.L. Corp.* v. *FPC*, 488 F.2d 1325, 1329 (D.C. Cir. 1973).

It is axiomatic that prior to deciding any questions concerning public convenience and necessity, the court must be able to review the evidence upon which such questions were originally decided by the Commission.

In the present case the court of appeals made a thorough and detailed analysis of the entire record and determined that a large portion of the authority granted by the ICC was unsupported by the existence of *any* traffic between origin and destination points within those areas. The court of appeals did not vacate the entire decision of the ICC. It affirmed that portion of the grant of authority that was supported by substantial evidence, and merely vacated that portion of the grant which was unsupported by any traffic evidence. One of the critical findings made by the court of appeals was that the Commission's grant of authority to the petitioner involved an award of more than 600 new authorities but approximately 200 of these were never mentioned in any evidence or testimony at the hearing. *See* Opinion of Court Below, Petitioner's Appendix A at 17a. In analyzing the record of this case, the court of appeals was strongly guided by existing ICC procedures with respect to the substantiality of traffic data presented by an applicant in a gateway elimination proceeding. In *Groendyke Transport, Inc. Extension—Gateway Elimination*, 126 M.C.C. 571 (1977), Chairman O'Neal, speaking for the entire Commission stated:

> A threshold question in any gateway elimination proceeding, then, is whether the applicant has transported a substantial amount of traffic through the pertinent gateway. To grant authority from and to points to which an applicant has not actually transported traffic would result in a grant of authority neither contemplated by the gateway rules, nor required by the public convenience and necessity. *Id.* at 574; *accord, Incorporated Carriers Ltd.—Gateway Elimination*, 128 M.C.C. 810, 814 (1978).

After reviewing a traffic study furnished by petitioner, the court of appeals observed that "there is no evi-

dence that *any* of the shipments abstracted in the first study were interchanged at York, Pa., the only gateway relevant in these proceedings." Opinion of Court Below, Petitioner's Appendix A at 14a.

In upholding a reviewing court's determination that a decision issued by the ICC was not supported by substantial evidence, this Court has expressed the view that there are definite limits to judicial reliance upon administrative expertise.

> If we were to reverse the District Court, we would in effect be saying that the expertise of the Commission is so great that when it says that average territorial costs fairly represent the costs of North-South traffic, the controversy is at an end, even though the record does not reveal what the nature of that North-South traffic is. The requirement for administrative decisions based on substantial evidence and reasoned findings—which alone make effective judicial review possible—would become lost in the haze of so-called expertise. *B & O R. Co.* v. *Aberdeen & R. R. Co.*, 393 U.S. 87, 91-92 (1968).

The analogy to the present situation is readily apparent. Petitioner wishes to resurrect an ICC decision which essentially holds that petitioner's evidence of sporadic traffic is sufficient to justify an immense award of operating authority in a gateway elimination proceeding. It must be emphasized that with respect to the vacated portion of the agency decision that the court below was not faced with evidence of sparse or irregular service between selected points in a few states, rather it was presented with a situation in which literally no traffic had been transported between a significant number of the states involved in this application. *See* Opinion of Court Below, Petitioner's Appendix A at 15a, 17a.

Reducing petitioner's argument to its most basic form, one finds that petitioner is asking this Court to review a voluminous record and engage in a lengthy factual review and analysis, the latter activity being one not generally engaged in by this Court, "[w]e do not grant certiorari to review evidence and discuss specific facts." *United States* v. *Johnson*, 268 U.S. 220, 227 (1925). The issues raised by petitioner involve the day-to-day details of agency adjudication, review of which has been delegated to and thoroughly performed by the Court of Appeals for the District of Columbia Circuit.

More importantly, this case involves no great issues of national scope or interest, for despite the immediate interest of the parties in the outcome of this matter, neither the ICC nor the court of appeals will be required to modify any existing procedures or regulations, regardless of the decision by the Court since no such procedures or regulations are at issue. The results in this case are the product of a unique set of factual circumstances which do not warrant any further review.

CONCLUSION

The granting of a writ of certiorari is an action which is committed to the unbridled discretion of the Supreme Court. Indeed, the issuance of such writs has been described as "matters of grace." *Wade* v. *Mayo*, 334 U.S. 672 (1948). The present matter however calls for such discretion to be exercised against the issuance of the writ because the Court of Appeals for the District of Columbia Circuit has properly performed its review-

ing function. For the aforesaid reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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